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Pure Smoke: Products Liability, Innovation, and the Search for the Safe Cigarette

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> Liggett, in short, developed a product which its researchers expected to be safer to smokers, cancelled its plans to market the product because of fear of litigation and pressure exerted by its competitors, and used its patent to deprive others of its invention.[1]
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> Galbraith Interrogatory No. 17
>
> Do you contend that any of the brands manufactured and/or marketed by you and listed in your answers to interrogatories above is a "safe" cigarette?
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> Reynolds' Response: —(Objection that interrogatory is not limited to brands smoked by plaintiff)
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> Reynolds further objects to this interrogatory on the grounds that it is vague and ambiguous and that Reynolds cannot reasonably ascertain what is meant by the phrase "safe cigarette" as used in the interrogatory.

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1. Jones, Day, Reavis & Pogue, *Corporate Activity Project* 235-36, *at* http://tobacco documents.org/tplp/681879254-9715.html (last visited Feb. 23, 2005).

> Reynolds further objects to this interrogatory on the ground that the form of the question is argumentative in that it requires Reynolds to assume that its cigarettes are a cause of human disease.
>
> Without waiving these objections, Reynolds responds that it has not been scientifically established that smoking is a cause of human disease.[2]

Does the prospect of tort liability lead firms to behave unsafely? Commentators have suggested that the law of products liability may both discourage innovation and valorize ignorance.[3] Liability concerns may have rendered prescription medicines and vaccines less effective, and automobiles less safe, than they otherwise might be. With respect to vaccines, the claim is that liability concerns have retarded the development of new vaccines while escalating the cost of existing ones. The warnings attached to prescription drugs are less informative than they might otherwise be.[4] With automobiles, the concerns are

> that product liability has three distinct types of socially detrimental effects on automotive engineering practice: (1) hesitance to pursue revolutionary or radical innovation (because radically different designs are hard to defend in court); (2) disincentives for engineers to engage in "honest and critical evaluation of the features on current and past vehicles" (for fear that internal company communications will become damaging legal evidence

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2. Memo to Dan Donahue from R. Michael Leonard, *Interim Report on Significant Alpha Documents Discovered in the Current Alpha Coding Project*, app. R, at 1, *at* http://tobaccodocuments.org/bliley_rjr/515873305-3566.html (Oct. 5, 1987) [hereinafter *Alpha Coding Project*].

3. PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 138, 142-43 (1991) (arguing that uncertainty generated by products liability suits based on, among other things, uncertain science discourages technological innovation to the detriment of society at large); *see also* Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 CORNELL L. REV. 773, 775 (1997) (arguing that tort causation rules encourage chemical manufacturers to remain ignorant about the long-term effects of their products).

Steven Garber suggests that there are four different ways in which liability rules can frustrate the goal of achieving the appropriate deterrence of unsafe activities:

> [T]he deterrence goal of liability (including punitive damages) is to increase safety from the amount that would prevail in the absence of any liability up to the socially optimal level by inducing the right kinds of safety-enhancing actions.
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> The policy debate and various literatures suggest that product liability and punitive damages can fail to achieve this goal in four analytically distinct ways:
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> - Underdeterrence: failing to induce all socially desirable increases in safety
> - Overdeterrence: inducing excessive increases in safety
> - Misdeterrence: inducing behavior that decreases safety
> - Absolute deterrence: inducing abandonment of socially worthwhile activities
>
> The last three categories all involve deterrence of socially desirable behavior.

Steven Garber, *Product Liability, Punitive Damages, Business Decisions, and Economic Outcomes*, 1998 WIS. L. REV. 237, 253.

4. Gregory C. Jackson, *Pharmaceutical Product Liability May Be Hazardous to Your Health: A No-Fault Alternative to Concurrent Regulation*, 42 AM. U. L. REV. 199, 213 (1992).

> when taken out of context); and (3) hesitance to improve vehicle designs quickly for fear that changes will be alleged—and believed—to be evidence of defects in the earlier designs.[5]

Direct evidence of these pernicious effects remains elusive, but not because the issue is unimportant. For critics of the current tort regime, "[n]o challenge to the modern liability system could be more fundamental . . . than the discovery that it actually resulted in more accidents, more risks, and less overall safety."[6]

This observation is directed to the *modern* liability system: the contemporary law of products liability. However, the claim that fear of liability can generate unsafe behavior predates modern tort law and the law and economics critique. Judges and legislators have long recognized the possibility and thought it appropriate to attempt to combat it. A guest falls down a dark staircase. The next day the owner installs a light at the top of the staircase. Is the plaintiff entitled to offer evidence of the newly installed light to show that the owner's failure to install the light earlier was unreasonable? It certainly meets the modern test of relevance[7]—it makes it more probable than it would otherwise be that that the defendant was capable of curing the problem. On the other hand, if the plaintiffs can always prove fault by showing that the defendants changed their behavior following the accident, defendants might resist doing things more safely for fear that a change would be an acknowledgement of fault. Judges have resolved the conflict between the policy of providing fact finders with all relevant information and the policy of encouraging people to correct dangerous conditions by favoring the latter.

The doctrine known colloquially as "subsequent repair" provides, in its simplest terms, that the plaintiff cannot introduce evidence of the defendant's changed behavior to establish that the defendant's prior

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5. Garber, *supra* note 3, at 272 (discussing Francois J. Castaing, *The Effects of Product Liability on Automotive Engineering Practice*, *in* PRODUCT LIABILITY AND INNOVATION: MANAGING RISK IN AN UNCERTAIN ENVIRONMENT 77-79 (Janet R. Huzinger & Trevor O. Jones eds., 1994), *available at* http://books.nap.edu/books/0309051304/html/77.html (last visited Feb. 23, 2005)).

6. Ctr. for Legal Policy at the Manhattan Inst., *Liability Law Conference: A Review*, *at* http://www.manhattan-institute.org/html/cjm_5.htm (July 5, 1998). Yet:

> Many of the most important potential effects of product liability cannot be seen or measured. Such effects include discouragement of innovation, as is often claimed by reform advocates seeking to reduce liability exposure of manufacturers. Deterrence of dangerous corporate behavior, as is often claimed by those defending the status quo, also cannot be seen or measured.

Garber, *supra* note 3, at 238.

7. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 128 (2d ed. 1994).

behavior was unreasonable. The doctrine attempts to allay the concern that liability rules may encourage unsafe behavior.[8] As the examples drawn from medicine and automobiles suggest, if the premise underlying the subsequent repair rule is sound,[9] it has implications that go far beyond whether the landlord will repair the loose board on the back steps. It suggests that any decision to make a product or practice safer will be made only if the decision maker believes that the benefits of the new product or practice outweigh the costs, including the increased liability costs that may result with respect to those already injured.[10] Moreover, the prospect of liability may even inhibit discussion within the company concerning the dangers posed by the product out of fear that these discussions will be used in litigation against the firm.[11]

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8. *See* Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 233 (6th Cir. 1980) (noting that the purpose of Rule 407 of the Federal Rules of Evidence, the subsequent repair rule, is "to permit people to improve their products without running the risk of increasing their liability in the past").

9. Not everyone agrees that it is sound. Wigmore had his doubts that it demonstrated that the defendant was negligent. 2 JOHN HENRY WIGMORE, EVIDENCE § 283 (3d ed. 1940). Modern commentators have questioned whether large enterprises would fail to improve a product out of fear that the improvement would be used as evidence against them. MUELLER & KIRKPATRICK, *supra* note 7, § 131.

10. In economic terms, this would be an instance of misdeterrence. As Garber states:

> Misdeterrence refers to inducing [the decision maker] to decrease safety. Perhaps the most important form of misdeterrence in product liability involves warnings, where product liability deters the use of socially desirable product labeling. In particular, the literature points to product liability as the reason that product manufacturers provide excessively extensive and detailed warnings, thus making it less likely that important warnings will be read, understood and heeded. Claims of misdeterrence are raised in other areas of liability. If such socially undesirable effects exist, they arise from features of the liability system generating perverse incentives: the legal safety of manufacturers increases (i.e., liability exposures fall) through actions that decrease the physical safety of those who might be injured. The policy debate also includes many claims of absolute deterrence. For example, liability is claimed to cause manufacturers to withdraw socially valuable products from the market (e.g., some childhood vaccines, intrauterine devices, small aircraft), and "stifle" innovative efforts in some product areas.
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> Absolute deterrence would be widely viewed as regrettable—i.e., involve deterrence of socially desirable behavior—for many activities (e.g., vaccines, public playgrounds). Some would view absolute deterrence for other products or activities (e.g., firearms, tobacco, sky diving) as socially desirable. In any event, we can expect decision makers at profit-seeking companies to avoid an activity entirely if—under prevailing liability arrangements—doing so seems more conducive to their objectives than engaging in the activity at any feasible level of safety.
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> In sum, product liability and punitive damages can change behavior in both socially desirable and socially undesirable ways. I refer to these possibilities simply as "good and bad deterrence."

Garber, *supra* note 3, at 254-55 (internal citations omitted).

11. For the view that evidentiary protection for subsequent repairs is misguided since the privilege ought to be available for those who engage in research that anticipates accidents rather

The possibility of increased liability costs exists because, even when it applies,[12] the subsequent repair rule is riddled with exceptions so that it provides uncertain protection to those who repair unsafe conditions.[13]

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than simply responds when they occur, see Edward J. Imwinkelreid & James R. McCall, Minnesota v. Philip Morris, Inc.*: An Important Legal Ethics Message Which Neglects the Public Interest In Product Safety Research*, 87 KY. L.J. 1127, 1145-47 (1999).

> Considered in that perspective, the facts in *Philip Morris* indicate the probability of an American tragedy. As Master Gehan's report states, Helmet Wakeham was a senior Philip Morris researcher. In his deposition in *Philip Morris*, Wakeham was asked about the "gentleman's agreement" forbidding in-house biological research by the defendant manufacturers. Wakeham conceded that years before the litigation, he had expressed his opinion in writing that scientific expertise in the tobacco industry could have produced beneficial research on smoking and health but for the concern over forced disclosure of any negative findings of such research. On this subject, he wrote, "Unfortunately . . . the scientific expertise of the industry, because of the liability suit situation, has not been permitted to make a contribution to the problem, a contribution which I believe was and is vital."
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> The defendants' staff researchers were in an unparalleled position to make important contributions to the scientific investigation of the health problems created by cigarette smoking. If normal competitive pressures had dictated individual firms' research, it is quite conceivable that a safer cigarette could have been produced. This development would have saved tens of thousands of lives and billions of dollars in health care expenditures. However, the manufacturers were so concerned about disclosure of possible negative findings from such research in their administrative, legislative, judicial, and public relations battles that they prohibited expert researchers in individual firms from contributing to the investigation of the health effects of smoking. Sober consideration of the loss of the possible benefits of the prohibited research should force us to confront the issue of the appropriate changes to make in the law of evidence to encourage such research.

Id.

For the argument that the substantive law of tort ought to address this problem directly through causation rules that encourage manufacturers to research the dangers of their products, see Wagner, *supra* note 3, at 775 (proposing that current common law rules on causation encourage manufacturers to remain ignorant by eschewing scientific research into side effects of their products). Wagner states:

> A manufacturer that conducts no research can generally avoid liability because plaintiffs and government research programs are unlikely to conduct scientific research on their own. Voluntary safety research, on the other hand, might reveal a long-term risk associated with a product, a revelation that would provide vital evidence for aggressive plaintiffs' attorneys and ultimately increase, rather than reduce, the manufacturer's exposure to lawsuits and potentially catastrophic liability.

Id.

12. *See* Ault v. Int'l Harvester Co., 528 P.2d 1148, 1149 (Cal. 1974).

13. According to Mueller and Kirkpatrick:

> So numerous are the practices beyond the reach of the exclusionary principle, and so often is evidence of subsequent measures admitted, that a perusal of the cases is enough to prove that Rule 407 of the Federal Rules of Evidence does not necessarily require exclusion of the evidence. While sometimes such evidence is excluded out of concerns of relevancy or confusion of issues pursuant to Rules 401, 402, or 403 of the Federal Rules of Evidence, the plain fact is that it frequently will get in, unless the opponent virtually concedes the points on which the evidence might bear, a strategy

Moreover, concern about future liability if the repair is not made will typically outweigh the concern that changing the practice may help the previously injured establish their case for liability. In addition to desiring not to harm people needlessly, those who know that a practice or product is inflicting injury and that there are feasible ways to reduce that injury will be inviting liability for all future injuries if they do not act. They may also face the prospect of punitive damages. The combination of future liability plus whatever protection is provided by the subsequent repair doctrine will typically result in a calculus that leads to the decision to correct the unsafe practice or condition.[14]

What happens when the potential defendant knows that his product is injuring people but there is no solution as obvious as nailing down a loose board or installing a light in a stairwell? Tobacco, for instance. If it is unreasonable to continue selling the product in its destructive form, one might assume that the product would be driven from the market simply as a result of the liability it engenders. Or the product would

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offering only cold comfort. Of course, a limiting instruction can be had in such cases, but would seem to offer even less in the way of comfort.

MUELLER & KIRKPATRICK, *supra* note 7, § 130.

14. As Mueller and Kirkpatrick put it:

> Under a rule of admissibility, the question whether pressure to make a change will be counterbalanced by pressure to avoid creating hurtful evidence turns upon many factors, including the magnitude and number of claims relating to the condition in question, the cost of making an injury-avoiding design change, and the timing of any such change during the ongoing product run (the earlier in the production schedule that a curative change might be implemented, the more likely that it will "pay for itself," resulting in a net saving to the mass producer by preventing relatively large numbers of future injuries and claims while by [sic] making evidence in favor of relatively fewer previous purchasers). But in several respects, pressures on the mass producer are peculiarly likely to favor making improvements even under a rule of admissibility. A mass producer which declines to take corrective measures in the face of known problems increases not only its exposure to claims by future purchasers for compensatory and possibly punitive damages, but also increases its risk of damage to good will and reputation for making and selling defective goods. These pressures weigh heavily in favor of taking remedial steps regardless of whether evidence of such steps is admitted or excluded, and the increased size and activity produce anything but a "symmetry" of pressures, or a stalemate which might induce inaction. Finally, it seems that applying the exclusionary doctrine can do little to quell worries that making an improvement will backfire (bringing on more cost in liability to prior purchasers than it obviates in liability to future purchasers), for the exception permitting evidence of subsequent measures to show "feasibility" is always there, and this issue is particularly hard to avoid in product liability actions.
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> In short, the exclusionary doctrine carried forward in Rule 407 of the Federal Rules of Evidence does not affect in any constructive way the pressures which bear upon the mass producer, and the doctrine itself is too uncertain and limited in application to have much impact even if it did speak to its situation.

Id. § 131 (internal citations omitted).

disappear from the market because consumers, knowing of its dangers, would stop purchasing it (suppressing negative information about a product's performance is not a *repair*). Suppose, however, that the producer knows that the product will continue to be consumed despite consumer awareness of the health risks it poses. The producer, moreover, has reason to believe that the consumer's knowledge of the dangers of tobacco will provide a reasonable level of protection against liability in suits by those who have been injured by the product.[15]

What incentive does the producer now have to determine whether it is possible to make the product less harmful? Indeed, what incentive does such a producer have to even discover whether the product is as harmful as critics suggest? Competition or morality may point towards trying to render the product less harmful, but liability concerns should push in the opposite direction. As long as the product cannot be made safer, the producer cannot be at fault for failing to render it so.[16] From a liability perspective, given the fragility of the protection under the subsequent repair rule, the rational position is for the producer to not even attempt to improve the product's safety lest some plaintiff suggest that his injury could have been avoided had the safety measures been employed earlier. The threat of tort liability would suppress innovation in pursuit of a safer product rather than encourage it. From a marketing point of view, moreover, even attempting to investigate whether cigarettes can be made less toxic carries the risk that consumers would begin to doubt the tobacco companies' claims that a definitive link between cigarettes and illness had not been established.

Did the tobacco companies behave this way? And did they do so because lawyers told them that this is how they ought to behave? And, if the lawyers did so, was the advice they provided about what the law required sound? Did it reflect new obligations imposed by the modern law of tort liability (post-1950s products liability) as opposed to either regulatory concerns or the traditional law of tort liability? If so, does the tobacco experience support the view that modern tort liability stifles innovation and reduces safety? This Article explores these issues through an investigation and analysis of tobacco company documents.

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15. Daniel Givelber, *Cigarette Law*, 73 IND. L.J. 867, 874-76 (1998).

16. The American Law Institute, in comment i to section 402A of the *Restatement (Second) of Torts*, "decided" that cigarettes were not defective simply because they were lethal and inherently unsafe. A 1991 summary of the existing state of tobacco company research acknowledged that combustion—the burning of tobacco—causes "biological activity" (the euphemism for carcinogenic activity). R.J. Reynolds Tobacco Co., *Conclusions* 1, *at* http://tobaccodocuments.org/rjr/512776313-6328.html (last visited Feb. 23, 2005) [hereinafter *Conclusions*].

These documents, produced by the tobacco companies in connection with tobacco litigation and as part of the Master Settlement Agreement, open a window into the role played by legal advice as the companies struggled with the question of whether and how to search for the holy grail of the "safe cigarette."

The analysis will proceed as follows. Part I will consider, in summary form, what we know about the efforts of the tobacco companies to produce a less toxic cigarette. Put in very general terms, the companies responded to their emerging awareness of the toxicity of their product by initially undertaking efforts to see if they could produce a less toxic product. These efforts have continued intermittently to the present day although the current version of the "safe cigarette," like its predecessors, has not achieved broad market acceptance either because it does not deliver sufficient taste or because smokers are unaware of its supposed health benefits.

This search for answers did not extend to investigate whether cigarette smoking was toxic. The companies' search was for a cigarette that did not "fail" tests for "biological activity." The industry did not concede that these tests actually proved anything about the toxicity of cigarettes. The companies took the position that a causal link between cigarettes and disease had not been established,[17] and they did not bear the burden of demonstrating that they were not producing a lethal product.[18] Their lawyers encouraged this position. Willful ignorance

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17. They are not the only industry attracted to this approach. *See* Wagner, *supra* note 3, at 775. Wagner argues that the common law of torts (and the need for the plaintiff to prove causation in particular) creates a disincentive for mass producers to conduct extensive safety research, noting "Tobacco, DES, the Dalkon Shield, and asbestos provide particularly vivid examples of the social calamities that attend inadequate legal accountability for ensuring the long–term safety of products before they are marketed." *Id.* Margaret A. Berger also concludes that the traditional understanding of causation "fails to promote moral responsibility or to deter societal harm." Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117, 2117 (1997). Discussing Agent Orange, asbestos, Benedictin, breast implants, the Dalkon Shield, thalidomide, and tobacco, she identifies a common thread in the accounts of the impact of these products: "[a]ll report that the corporation in question did not test its product adequately, initially failed to impart information when potential problems emerged, and did not undertake further research in response to adverse information." *Id.* at 2135.

18. This position proved successful in at least some trials. Interviews with jurors following the defense verdict in *Galbraith v. R.J. Reynolds Tobacco Co.*, No. 144417 (Cal. Super. Ct. Dec. 23, 1985), indicated that the defense lawyers had achieved considerable success at the trial in denigrating epidemiology and persuading the jury that causation had not been established. Jones, Day, Reavis & Pogue, *(Draft) Report on* Galbraith v. R.J. Reynolds 4-8, *available at* http://tobaccodocuments.org/tplp/680711146-1223.html (Jan. 28, 1986) [hereinafter *Galbraith* Report].

remained a central feature of their approach to tobacco litigation through the remainder of the twentieth century.[19]

Parts II through IV will focus on the 1980s and on the conduct of a specific company, R.J. Reynolds Tobacco Company (RJR). During this period of time, a "defensive strategy" was firmly in place. The heart of this strategy was a marketing campaign that assiduously avoided making any health claims for cigarettes, even those claims whose apparent purpose in the market was to provide some level of reassurance to the smoker that he was limiting his intake of carcinogens.

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19. The twenty-first century has seen a change in strategy. Phillip Morris now acknowledges that smoking cigarettes causes cancer and other diseases: "Philip Morris USA agrees with the overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers. Smokers are far more likely to develop serious diseases, like lung cancer, than non-smokers. There is no safe cigarette." Philip Morris U.S.A., *Health Issues*, *at* http://www.pmusa.com/health_issues/cigarette_smoking_and_disease.asp (last visited Feb. 23, 2005).

Brown & Williamson agrees:

> Smoking and the health of smokers and non-smokers alike are matters of great public concern, frequently commented upon by legislators, regulators, public health authorities, scientists, doctors, smokers and others. Brown & Williamson's own opinions on smoking and health issues have at times been poorly understood or simply mischaracterized, whether in popular media, regulatory proceedings, health policy debates or litigation. In order to minimize if not eliminate misunderstanding, we decided some time ago to share our opinions on this web site. . . . [S]moking cigarettes is a cause of disease.

Brown & Williamson, *Our Opinions*, *at* http://www.bw.com/Index_sub2.cfm?ID=12 (last visited Mar. 8, 2005).

RJR takes a more moderate position:

> R.J. Reynolds Tobacco Company (RJRT) manufactures products that have significant and inherent health risks for a number of serious diseases, and may contribute to causing these diseases in some individuals. There is universal awareness of the conclusions of the Surgeon General, and public health and medical officials that smoking causes serious diseases, including lung cancer and heart disease. Individuals should rely on these conclusions when making any decision regarding smoking. Epidemiological studies (population studies comparing the incidence of disease between groups of smokers and groups of nonsmokers) have led the U.S. Surgeon General to conclude:
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> - Smokers have almost twice the risk of having coronary heart disease as nonsmokers.
> - Smokers' risk of getting lung cancer is approximately 14 times that of nonsmokers.
> - Smokers' risk for chronic obstructive pulmonary disease is approximately 10 times that of nonsmokers.
>
> While these studies do indicate that smokers as a group are at higher risk, they do not predict the likelihood of any individual smoker getting lung cancer, heart disease or any other condition that has been linked to smoking. An individual's risk for contracting a smoking-related disease is based on many factors in addition to smoking.

R.J. Reynolds Tobacco Co., *Health Issues*, *at* http://www.rjrt.com/TI/TIHealth_Issues.asp (last visited Feb. 15, 2005).

While rejecting all health claims for its cigarettes, RJR was also developing Premier, a product designed to eliminate the incineration of tobacco and the deadly smoke that it generates. Lawyers were involved here as well: had Premier been a success, the company was fully equipped with legal arguments as to why the ability to develop Premier did not mean that they were at fault for failing to do so earlier.

Part V will attempt to evaluate the actual influence of lawyers and the law on the behavior of the tobacco companies in relation to the pursuit of the safer cigarette. Liability concerns played a significant role in firm behavior. They contributed to a culture of obfuscation. The tobacco companies responded to the knowledge that burning tobacco was lethal by behaving in just the manner that the "subsequent repair" rule supposedly counteracted. With lawyers leading the way, they adopted the position that there was no problem. There was no "scientific proof" that tobacco smoke caused cancer and, consequently, there was nothing to repair. This profoundly counter-factual position needed constant shoring from within, and the lawyers provided much of that support. At the same time, the companies pursued the legal position that the dangers of cigarette smoking were so well known that a smoker could only blame himself for his illness.[20] The possibility of a safer cigarette challenged both positions. This did not, however, prevent RJR from trying to develop just such a product. The issue for RJR was whether the market benefits from the safer cigarette outweighed the liability concerns it might generate.

Liability concerns probably played a central role in leading RJR to involve lawyers heavily in scientific research and in the direction of that research—toward steps not designed to advance public health. If robust scientific inquiry unchecked by liability concerns could have actually produced a cigarette that was safe to smoke, these moves might well have had a perverse effect on safety. However, even as the lawyers took the helm it was reasonably clear that it was not going to be possible to achieve the alchemist's dream of turning tobacco smoke into fresh air, and the cigarettes about which one might make the claim were quite unlikely to command much consumer interest. And there was little reason to expect much consumer interest in these cigarettes given the decision not to advertise these cigarettes as safer, a decision driven by the industry's insistence that causation was unproven. One could not claim that the new cigarettes were *better* for the smoker's health if the old

20. This position—that the plaintiff had ample opportunity to quit (smoking a product that had not been shown to be harmful)—also appealed to the *Galbraith* jury. *Galbraith* Report, *supra* note 18, at 47-74.

cigarettes had no adverse health effects. Yet legal control over research did not mean that the companies entirely abandoned the search for the safer cigarette. Indeed, a number of companies pursued the dream through their internal research.[21] Two such cigarettes are currently marketed.

Lawyers also had a profound influence on marketing. The tobacco companies abjured any express claim that even the lowest tar cigarettes had positive health benefits. This self-abnegation arose out of concern for market strength as well as potential tort liability. First, the companies were concerned that emphasizing the health benefits of some cigarettes might suggest to consumers that other brands (e.g., the ones they were currently smoking) were unhealthy. This might lead people to stop or reduce smoking, an undesirable outcome from a marketing perspective. Second, the companies were particularly eager that cigarettes not be regulated by the Food and Drug Administration (FDA)[22] or the Federal Trade Commission (FTC),[23] and they feared that making health claims for certain cigarettes might trigger such regulation.[24]

Liability fears supplemented these concerns. If some cigarettes actually did pose less of a health risk than others, the lawyers' insistence that cigarettes not be marketed on this basis might have had an adverse

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21. Jones, Day, Reavis & Rogue, *supra* note 1, at 197-250.

22. As a training presentation for incoming marketers at RJR put it:

> You may be asking yourselves what is so bad about being under FDA regulation? Let's just say that your product bears heavy regulatory burdens compared to other consumer products if it is put under FDA [sic]. Certain safety and effectiveness data would need to be developed. It is subject to seizure and condemnation as an adulterated or misbranded drug. There are approvals of applications to be filed pursuant to the Act and so on. I think you can assume that you do not want your product to be classified under the FDA.

Report Prepared by RJR In-House Legal Counsel for the Purpose of Rendering Legal Advice Concerning Smoking and Health Issues 4, *at* http://tobaccodocuments.org/Bliley_rjr/508454787-4838.html (last visited Feb. 23, 2005) [hereinafter Training Presentation].

23. E.g., RJR sought to persuade the Federal Trade Commission that advertising Premier (its "safer cigarette") as (a) a major technological breakthrough that (b) delivered a "cleaner" smoke did not amount to deceptive or misleading advertising. Memorandum of R.J. Reynolds Tobacco Company Concerning Premier, A New Cigarette That Heats, But Does Not Burn, Tobacco 41-52, *at* http://tobaccodocuments.org/rjr/506149753-9823.html (last visited Feb. 23, 2005).

24. This was certainly the message that the lawyers delivered to the marketers:

> As a basic proposition, cigarettes do not come under the Federal Food, Drug and Cosmetic Act and, therefore, are not under FDA regulation. It may sound like a typical lawyer ploy, but I am going to have to qualify that statement to this extent: Cigarettes, *depending upon the claims they make in advertising*—and this is where you come in—*can* be classified under the FDA. This has happened at least three times but, I hasten to add, not with any brands that we manufacture.

Training Presentation, *supra* note 22, at 2.

health impact. Here again, no data demonstrate that "low tar" smokers suffer fewer adverse health effects than the other smokers. Smokers addicted to nicotine—i.e., all regular smokers—apparently compensate by inhaling low tar cigarettes more vigorously, thus negating whatever benefits might flow from tar reduction.[25] Many smokers would have been extremely receptive to an advertising claim suggesting that some cigarettes were less dangerous to smoke than others. Lawyers prevented the companies from making these (apparently false) claims. Interestingly, their advice dovetailed with the position of public health advocates. Rather than allying themselves with the effort of RJR to produce a less toxic product, these groups resisted the idea that there could be a "safer cigarette" whose marketing would advance the public health.[26]

While the evidence seems clear that low tar and nicotine cigarettes as smoked were no healthier than traditional cigarettes, there is the possibility that, had the companies actually marketed the cigarettes that did reduce "biological activity" as "safe," smokers might have switched and, in so doing, minimized the damage of cigarette smoking. There are a number of very large "ifs" associated with this hypothesis,[27] but, if true, the failure to market the safer cigarettes that were developed (as well as the failure to develop a variety of safer cigarettes) might constitute an instance of legal concerns, including tort liability, generating unsafe behavior.

I am not suggesting that the lawyers who advised the cigarette companies were advocates for public health or that they were anything less than fully adversarial—and perhaps more than that—in defending their clients against tort liability. Each lawsuit was defended more than vigorously. The goal was to defeat the plaintiff as much by depleting his resources and will to continue the struggle as by securing victories in court. Nor did the lawyers advising the companies appear to be overly concerned with the justice of their mission. But their advice as to how to avoid liability probably did not make cigarettes more dangerous than they otherwise would have been and it may have provided some slight

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25. Nat'l Cancer Inst., *The Truth About "Light" Cigarettes: Questions and Answers*, *at* http://cis.nci.nih.gov/fact/10_17.htm (Aug. 17, 2004).

26. Amy Fairchild & James Colgrove, *Out of the Ashes*, 94 AM. J. PUB. HEALTH 192, 197 (2004) (noting that the American Medication Association (AMA), the American Public Health Association, and state departments of public health opposed Premier, with the AMA "leading the charge" to convince the FDA to regulate Premier as a drug delivery device).

27. Inst. of Med., *Clearing the Smoke: Assessing the Science Base for Tobacco Harm Reduction* 3-8 (2001), *at* http://www.iom.edu/includes/dbfile.asp?id=4145 (last visited Feb. 23, 2005).

amelioration of the health crisis generated by tobacco. This assumes that the public health gains from the lack of assurance that one was improving one's health by smoking "low tar" outweighed the public health losses stemming from the reluctance of the industry to tell smokers that the "safe" cigarette was better for them.

The lawyers were not alone in urging caution. The safe cigarette story may provide a larger lesson in the ongoing debate concerning whether tort law creates perverse incentives that leave us less safe than we might otherwise be. Context matters. Liability concerns do not exist in a regulatory or commercial vacuum. Liability fears can certainly push in what may appear to be an unsafe direction: had there been a way to make a safer cigarette with significant consumer appeal, tort concerns might well have counseled against its development. Whether such counsel would have prevailed had the companies been persuaded that such a cigarette could be developed is another question altogether. Even in an industry as obsessed with tort lawsuits as tobacco, other factors—e.g., the aversion to federal regulation and legislation, marketing concerns, the opposition of the public health establishment—may well have played the dominant role in the approach to developing and marketing a safer cigarette. While holding "all other factors constant" may be necessary to the development of a theoretical argument concerning the impact of tort law on behavior, those "other factors" may be what moves design, manufacturing and marketing decisions.

I. PRODUCTS LIABILITY AND THE SEARCH FOR THE SAFER CIGARETTE

Despite the assertion that there is something distinctive about the modern law of products liability that decreases safety, attempting to distinguish between the influence of the traditional tort test of negligence and the "modern" law of products liability is an uncertain undertaking. To a very great extent, with respect to the claim that a product was designed unsafely, the "modern" law of product liability requires the same level of unreasonable behavior as the traditional law of negligence.[28] This is certainly what the drafters of the Third Restatement of Torts believed, and they could point to a great deal of case support for

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28. 2 American Law Institute Reporters' Study, *Enterprise Responsibility for Personal Injury: Approaches to Legal and Institutional Change*, 81 (1991). "It would be helpful if courts explicitly recognized that this approach to design defects (as well as the approaches now followed in practice) is really a form of negligence rather than the strict liability used for manufacturing defects." *Id.* Some courts did employ tests for design defect that appeared to embrace strict liability. Thus, a mid-1980s legal memoranda prepared for RJR by lawyers at Jones Day identified the risk-utility test employed by New Jersey as presenting a serious possibility of liability without proof of unreasonable behavior. Jones, Day, Reavis & Pogue, *supra* note 1, at 21.

their position. Courts transformed products liability law in the second half of the twentieth century by the elimination of the requirement of privity between the consumer and the producer of the product, not by embracing and enforcing a doctrine that made fault irrelevant. Occasional decisions contained language pointing in the direction of liability without fault, but it is difficult to locate very many decisions actually imposing liability under such circumstances. With respect to design claims, liability depended upon unreasonable behavior. Liability expanded because the elimination of privity meant that the victims of the unreasonable behavior could sue the people who behaved unreasonably.

This account does not answer the question of whether firms *perceived* that the law had become more exacting—that it imposed liability without fault. In order for a change in law to affect behavior, those subject to the law must know of the new law. While there are a variety of ways in which information about new legal obligations might come to the attention of the affected parties, the most traditional and most accurate route is the one followed here—the defendants learned about their legal obligations from their attorneys. The attorneys would have powerful incentives to present a picture of the developing law that focused upon its apparent sweep.

First, unreasonableness is in the eye of the beholder, and the calculus of those determining whether to produce or modify a product may well be different than that of a jury deciding whether to find liability. Kip Viscusi despairs that firms might fail to engage in careful cost-benefit analysis because a jury might impose punitive damages precisely because the firm engaged in the economically rational calculation that it is cheaper to let an accident occur than to prevent it.[29] Yet a jury is not required to agree with Richard Posner's interpretation of Learned Hand[30] and celebrate as reasonable a clear-eyed decision to let accidents happen because they are too expensive to cure. The jury has considerable freedom to disagree with firms about what is reasonable, and those engaged in producing products may well believe that this freedom really translates, as a practical matter, into liability without fault. Their lawyers would be unlikely to assure them that this could never occur.

Second, the lawyers advising the firms were not simply concerned with describing the law of a particular jurisdiction as of the moment that they rendered advice. Their clients, like all clients, were interested in the

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29. W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 550 (2000).

30. United States v. Carroll Towing Co., 159 F.2d 169, 170-73 (2d Cir. 1947).

legal consequences of proposed action. This requires a prediction about what courts are likely to do in the future. It may have appeared that products liability was moving towards liability without fault even if, in the end, it never quite got there. As a profession, lawyers tend not to underestimate legal risk. There is a tendency for the worst case to become the modal case,[31] at least when the client is being advised of the risks inherent in a particular form of action. This tendency becomes all the more pronounced when the advice given is designed to cover what may happen in fifty different jurisdictions rather than one. Legal advice also tends towards the conservative. Change is problematic if it signals the existence of a problem that triggered the change.

Third, the line between purely legal and purely commercial advice was particularly difficult to draw in the context of the tobacco industry. The industry had lived under the cloud of potentially ruinous liability from the 1950s forward. Lawyers played a very large role in many aspects of the tobacco business from research through marketing. They did not assume these roles because they were particularly thoughtful about scientific research or marketing; they attained these roles because what the companies learned about the health effects of their product and what the companies said about that product could affect liability. I am not suggesting that the lawyers consciously exaggerated the legal dangers that the tobacco firms faced. However, the more vivid the danger the companies thought they were facing, the more likely it was that they would turn to lawyers to meet the challenge. Put somewhat differently, the lawyers had little to gain and much to lose by downplaying risk.

II. THE SEARCH FOR A SAFER CIGARETTE

The historical record reveals that the tobacco companies pursuit of a safer cigarette was fitful: the initial research into creating a safer cigarette among some tobacco companies "seemed motivated by a genuine concern over health effects of smoking and a belief that, if the toxic components of cigarette smoke could be identified, those agents could be removed and a 'safe' cigarette created."[32] These initial efforts abated, however, and by the end of the 1970s the cigarette companies

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31. This process may be facilitated by the tendency of corporate decision makers, when they do consider liability risks, to overestimate them. Garber, *supra* note 3, at 250 (discussing the "availability heuristic" which leads people to overestimate the likelihood of particularly memorable events recurring).

32. STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS 108 (1996), *available at* http://ark.cdlib.org/ark:/13030/ft8489p25j/ (last visited Feb. 23, 2005).

embraced a "defensive" posture.[33] According to a leading researcher at the firm, Liggett and Myers had worked since 1955 to develop a safer cigarette which was ready for market in 1979 when, "on the advice of lawyers," the firm made the decision to abandon the project.[34] In lieu of actually producing a cigarette that was demonstrably less toxic, the tobacco companies instead came up with product modifications—e.g., filters, the "tar" derby—that created the appearance of reducing risk without actually doing so.[35]

The search for the less toxic cigarette was a strategy, but not the exclusive or even the major strategy employed by the cigarette companies in response to the emerging data linking cigarettes to disease. Consider, for example, a 1961 memorandum by a Phillip Morris scientist responding to a letter from the President of the company asking for "strategy in the defensive health area," defined in the memorandum as "that realm of planning for operational changes which would be affected contingent upon the appearance of conclusive determination (apparent or real) of a causal link between smoking (or some component of cigarette smoke) and the development of somatic pathology."[36] While this memorandum did not represent an official statement of company policy, it suggests how the cigarette companies approached the looming health crisis both in what it considered and what it omitted.

The eleven proposals for defensive health strategy started with the development of products that would substitute for a cigarette, and then turned to the company acquiring subsidiaries manufacturing products that would be a substitute for smoking. Then came the "safer cigarette" options:

1. investigating whether the combustion temperature could be altered with the view of moving it out of the range in which it produces lethal residual tars;
2. exploration of natural and synthetic substitutes for tobacco;
3. identifying other variables in the carcinogenic equation;
4. developing "cigarette variations such that at the dictation of momentous breaks in cancer research, any one of several elements can be eliminated from the smoke. This might be

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33. *See id.* at 109-10.

34. Philip J. Hilts, *Method to Produce Safer Cigarettes Was Found in 60's, but Company Shelved Idea*, N.Y. TIMES, May 13, 1994, at A20 (describing the decision of Brown & Williamson).

35. GLANTZ ET AL., *supra* note 32, at 25-27.

36. Memorandum from W.L. Dunn to Dr. A. Bavley, *Defensive Health Strategy* 1, *at* http://tobaccodocuments.org/landman/1001882173-2174.html (July 19, 1961).

> developed to the point of stockpiling critical materials so as to expedite the production and distribution of the new product."[37]

The remaining suggestions were defensive:

1. developing an advertising program "to alert the smoker to the danger of excessive indulgence or to the avoidance of that aspect of smoking behavior conducive to the development of pathology";
2. diversifying into other market areas;
3. developing or acquiring those who make products that would counteract the carcinogenic process;
4. developing withdrawal medication or tranquilizers to help with withdrawal;
5. developing products or acquiring manufacturers of products "that could counteract the carcinogenic process"; and
6. "the development of a more comprehensive and detailed surveillance of the activities of competitors, entailing the specific assignment of responsibility for intelligence collection and interpretation to an individual staff member."[38]

The ensuing decades saw the companies adopt many of these strategies. They struggled with whether one could either alter what is burned or change the way it is burned or filter the products of the burning in a way that would produce less toxic cigarettes.[39] The companies kept a close eye on one another in their various efforts to deal with the toxicity of tobacco smoke. Indeed, they apparently agreed with one another not to produce a "safer cigarette" (the "gentleman's agreement"),[40] although the agreement was often honored in the breach.

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37. *Id.*

38. *Id.* at 2.

39. For the explanation by RJR of their efforts to produce the safer cigarette, consult R.J. Reynolds Tobacco Co., *A History of Efforts to Reduce the Risk of Cigarettes*, *at* http://www.rjrt.com/TI/TIrisk_reduct_history.asp (last visited Feb. 23, 2005). Internal documents tell roughly the same story although they add the acknowledgement that nothing short of a Premier type product (which does not involve the combustion of tobacco) eliminates "biological activity." *Conclusions*, *supra* note 16, at 1. Other companies tell other stories. For Brown & Williamson's version of the safe cigarette history, consult Brown & Williamson, *The Search for a Less Hazardous Cigarette*, *at* http://www.bw.com/Index_sub2.cfm?ID=12 (last visited Feb. 23, 2005). Phillip Morris contents itself with quoting the government that there is no safe cigarette. Philip Morris U.S.A., *Low Tar Cigarettes*, *at* http://www.pmusa.com/health_issues/low_tar_cigarettes.asp (last visited Feb. 23, 2005).

40. *See* Imwinkelreid & McCall, *supra* note 11, at 1145-46.

The stronger companies diversified in order to reduce the possible legal and financial exposure arising out of selling a fatal product.[41]

What the cigarette companies *did not do* is adopt the approach of advising consumers through advertising that there might be difficulties in "excessive indulgence." And the memorandum never even suggested that they undertake their own research to either confirm or dispute the claim that cigarettes cause cancer. In this instance, ignorance, not honesty, was deemed the best policy.

The decision to neither advertise about the dangers of excessive indulgence nor attempt to show that cigarettes do not cause cancer reflects the influence of a complex of factors, legal, scientific, and commercial. On the scientific front, there was and is no confidence that there is such a thing as a safe level of cigarette smoke consumption.[42] On the commercial front, it was and is challenging to determine how to tell people that cigarettes are bad for them but they should smoke anyway. Moreover, Congress helped with this problem by requiring warnings on cigarette packages. Legal advice also played a significant role. The tobacco companies learned through their lawyers that, when it came to the impact of their product on the health of their customers, they ought to be neither more nor less knowledgeable than the consumer. Scientific research had its place, but that place did not involve providing the companies with more than the publicly available information about health.[43]

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41. RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS 580-617 (1996).

42. The Institute of Medicine of the National Academy of Sciences advocates the use of the term "potential reduced-exposure products" (PREPs) to refer to cigarettes that are designed to reduce exposure to toxicants. The Institute notes:

> Although both types of products [PREPs and smoking cessation aids] could potentially result in *reduced exposure* to toxicants from a given instance of tobacco use, such reduced exposure does not necessarily assure *reduced risk* to the individual user or *reduced harm* to the larger population. At the population level, for example, the potential benefits might be reduced if some people, perceiving these products to be safer, begin using tobacco who otherwise would not have done so, if some smokers who might have quit do not, or if some former smokers resume smoking.

Inst. of Med., *supra* note 27, at 3.

43. In *The Cigarette Papers*, Glantz summarizes the history:

> By 1952 early epidemiological studies in the United States and the United Kingdom were showing substantial risks for lung cancer related to cigarette smoking. At the time, arsenic and benzo(a)pyrene (or benzpyrene) were the only two known carcinogenic materials suspected of being in tobacco smoke. As of 1952, only a single, unconfirmed report, published in 1939, had indicated that benzo(a)pyrene could be found in tobacco smoke. The next published report of similar findings appeared in 1954. Therefore, the unpublished work B & W scientists were doing in 1952,

A 1966 memorandum of a conference at American Tobacco's new research facility laid out some of the concerns.[44] The purpose of the conference apparently was to bring lawyers and scientists together to set forth the company's position with respect to scientific research. The company believed that its job was to do research on smoke and smoke composition from a "chemical and physical standpoint" but to leave research into "health effects" to others.[45] "There were many ways in which animal or other biological research, were it to be conducted by the Company, *could restrict the Company's freedom to accept, before Congress and in the Courts, expert medical and scientific views on a wide range of problems that could not now even be anticipated.*"[46] The memorandum suggested that the problem was the lack of sophistication by juries, judges, and Congress.[47] Taking as an example the work of Dr. Ernest Wynder demonstrating that painting smoke condensate on the back of mice produced skin tumors, Ms. Brown, an attorney for the company, explained that

> [s]hould the company now conduct some similar experimentation it would be in the position, as seen by a jury or Congress, of asserting that such experimentation has meaning. This will be argued to be an "admission" by

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achieving a "partial isolation" of benzo(a)pyrene from tobacco leaf and tobacco smoke, was at the leading edge of the field at the time.

By 1953 B & W had begun a more intensive effort to study tobacco and its effects. Dr. I.W. Tucker was appointed as the first full-time director of B & W's Technical Research Department. In his departmental report at the end of 1953, according to the B & W chronology, Dr. Tucker said that the smoking and health situation "will be an important factor in establishing the direction which our research department will take." A few months later, at an industry conference in Bristol, England, Dr. Tucker stated that "tobacco companies' research departments must now conduct work on smoke constituents not only for technological improvements but also for better understanding of their products as a result of the smoking and health controversy." Unfortunately for the tobacco industry, the results of these early studies were discouraging. As we discuss in the following chapters, by the 1960s BAT scientists had concluded that nicotine is addictive and company-sponsored laboratory tests showed that components of tobacco smoke cause cancer in animals. The company responded to these findings at first by attempting to create a "safe" cigarette, although it publicly maintained that cigarettes had not been proven dangerous to health. When the scientists had concluded that they would not be able to create a "safe" cigarette, the company retreated behind a stone wall of denial, where it remains to this day.

GLANTZ ET AL., *supra* note 32, at 31-32 (internal citations omitted).

44. *See* Memorandum of Conference on March 23, 1966, at the New Research Facility of the American Tobacco Company 1, *at* http://tobaccodocuments.org/tplp/MNATPRIV00026920-6927.html (Mar. 29, 1966) [hereinafter American Tobacco Conference].

45. *See id.*

46. *Id.* (emphasis added).

47. *See id.* at 2.

> the Company; and the "admission," it will be argued, proves the proponents' claims that their experimentation established a causal relationship. If the Company denies that, it will be charged with saying, in effect, "our work has meaning; but when Wynder does the same work, it has none."[48]

After discussing the kind of research that the company might undertake, the memorandum ends with another admonition from Ms. Brown:

> [P]roblems would undoubtedly arise in Congress and in law suits when scientific techniques or experiments were used which parallel or duplicate those we have heretofore criticized in terms of certain of the conclusions attempted to be derived from them by any proponents of the smoking theory. *It would be helpful to the attorneys to be informed when such techniques and experiments are contemplated or in progress so that any problems could be ironed out as they arose. It is entirely for the Company to decide, of course, on the experiments it believes valuable and the techniques to be used.*[49]

Ignorance of the actual health effects of smoking has remained a central feature of the tobacco industry's response to claims that cigarettes are bad for your health. Thus, in 1989, J. Kendrick Wells, III, of Brown & Williamson, rejected a suggestion that the company approach "regulators" with a view towards marketing cigarettes that would "have modifications such as lower biological activity, lower levels of specific smoke constituents, and lower tar and nicotine."[50] In his view:

> [S]cience does not support offering a modified product as relevant to concerns about smoking and health . . . . B & Ws positions on smoking and health are based on science. Today, our opinion is science has not established that smoking causes disease in humans and no cigarette can be constructed that would be safer than another. *If at some future point a valid*

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48. *Id.* at 3.

49. *Id.* at 7-8 (emphasis added). That lawyers thought that it was a poor idea for the industry researchers to investigate particular areas did not mean that no investigations occurred. BAT continued basic research well beyond 1966. GLANTZ ET AL., *supra* note 32, at 127-36. Nonetheless, the 1966 memorandum exemplified an understanding and an approach that dominates tobacco company thinking and action to this day.

RJR began animal research in 1965 and discontinued the activity in 1970. Paul E. Brubaker, *Report on the R.J. Reynold's Tobacco Company's Biology Research Division: A Program Review* 1, *at* http://tobaccodocuments.org/bliley_rjr/507928501-8691.html (Dec. 15, 1985).

50. Memorandum from J. Kendrick Wells, III, to M.J. Pritchard, *Objections to Product Innovation Strategy* 1, *at* http://tobaccodocuments.org/tplp/680701034-1038.html (Oct. 31, 1989).

> *breakthrough occurred in the science of causation, B & W would change its positions to conform to the new state of the science.*[51]

The companies stuck to this position even as the research they were doing on potential jurors demonstrated that the public was not persuaded.[52] As a 1985 memorandum analyzing litigation strategy for RJR notes, "jury research to date suggests that no evidence on this issue [that cigarettes do not cause illness] will actually persuade the jury and that anyone testifying to general causation for the defense faces a loss of credibility."[53] This did not mean that the industry should simply acknowledge that cigarettes cause cancer and other diseases. Deniability had its virtues.

> Rather than try to establish affirmatively the legitimacy of the "it's not proven" position, we should focus on creating doubt about the validity of the "it is proven" position. The distinction is subtle, yet it permits the industry to focus on the idea that established causal connections should be expected to produce consistency in results and to utilize the various anomalies to suggest (but probably not "prove") that people are leaping to an unjustified conclusion.[54]

Tobacco companies faced a considerable challenge in maintaining that they were ignorant of health effects in the face of public awareness of the dangers. Indeed, their position throughout has been that the consumer knows as much as they do about the dangers of their product, and has agreed to accept those dangers in consuming the product. One rationalization for this approach can be found in the 1966 memorandum of the American Tobacco research conference:

> Miss Brown stated that the Company was legally held to know what science knows or can know about its products. The Company has heretofore met this obligation by finding out about its products and has looked to independent institutions and experts for cancer research—which must be conducted on a scale the Company could not hope to match. This is not because *scientific* validity stands or falls according to the scale of the experimentation, but because judges and juries (and Congressmen) tend to measure the "reasonableness" of the Company's research effort on the scale of the problem (cancer, heart disease, chronic respiratory disease)

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51. *Id.* (emphasis added). Although there is no known "breakthrough" to which to attribute their change of heart, Brown & Williamson now acknowledges that cigarette smoking causes disease. Brown & Williamson, *supra* note 19.

52. *See* Memorandum from Jones, Day, Reavis & Pogue, to File, Smoking and Health Litigation Tactical Proposals 1, *at* http://tobaccodocuments.org/tplp/680712261-2337.html (Aug. 10, 1985) [hereinafter Tactical Proposal Memorandum].

53. *Id.* at 36-37.

54. *Id.* at 37-38.

> presented, which is vast. The Third Circuit in the *Pritchard* case for example, deprecated L&M's 1952 "nose, throat, and accessory organs" test as a test for carcinogenicity (which, of course, it was never intended to be anyway). Thus there is a real danger that any effort on the part of the company to enter the biological research field would be deprecated by judges, juries, and Congressmen as "paltry." She stated that the Company of course could not hope to match in sheer volume of paper the extensive (because largely duplicative) adverse literature in the smoking and health field. But laymen would judge its efforts that way.[55]

Tobacco companies should not do scientific research about the health impact of cigarettes because doing so would demonstrate that they took seriously studies demonstrating that cigarettes were bad for the smoker's health. They should also refrain from doing so because their efforts would be miniscule in comparison to what independent researchers would produce. Both rationalizations are cast in terms of the public's unsophisticated appreciation of what it would mean for the tobacco companies to independently examine the link between tobacco smoke and bad health. By the 1960s, the companies had learned to rationalize their refusal to engage in health effects research in terms of the misunderstandings such activity would engender. The law apparently engendered these misunderstandings by permitting unsophisticated audiences to draw misguided inferences from them—e.g., that those in charge of the companies may have thought that there was something to the claim that cigarettes cause cancer.

RJR engaged in health effects research from 1965 through 1970 when it closed its research facility, colloquially known as the "mouse house."[56] RJR also laid off the scientists working in the facility. One of the scientists working at the facility attributed the closure to concern about the use litigants might make of the research results: "The decision to shut it down was made because Reynolds did not at that time want to be collecting information that might be detrimental to itself—what would be telling the public what its product does. Ignorance is bliss."[57] Company officials provided a different explanation—that animal testing could be done more efficiently by the Council for Tobacco Research, particularly since the facility was, according to those officials, only rudimentary.[58] L'affaire "mouse house" was sufficiently troubling to

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55. American Tobacco Conference, *supra* note 44, at 4-5.

56. Justin Catanoso, *Closing up the Doors at "The Mouse House*," GREENSBORO NEWS & REC., Sept. 26, 1992, at 1.

57. *Id.*

58. *See id.* There is another part to the story. At the same time that the biological lab was being closed, RJR was presented with a proposal from the Industrial Biotest Laboratories for it to

attorneys representing RJR that they engaged the services of a toxicologist in 1985 to prepare an extensive 191-page review of the biological studies performed from 1965-1970.[59] At the same time, lawyers for RJR undertook a comprehensive analysis of the possible use that litigants might make of all of RJR's research efforts.[60]

From an evidentiary perspective, concern about the use that would be made of health effects research was appropriate. The issue would be whether conducting these experiments was relevant to any issue in tort litigation. It is, since knowledge—both what the defendant knew and what it should have known—is relevant to the reasonableness of the defendant's behavior. The evidentiary relevance of the research does not answer the question of whether a firm ought to undertake it. If the research demonstrated no link between cigarette condensate and animal tumors, then the defense would want to put this evidence before the jury. It would both indicate that the company was acting reasonably by pursuing the question of whether cigarettes caused cancer, and it would provide affirmative evidence that cigarettes did not have this effect. If the research was inconclusive, the company might still put it forward as evidence that it behaved reasonably in trying to get to the bottom of the

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conduct research on a cigarette that would be safe for ninety percent of the population. Memorandum from Murray Senkus to Colin Stokes and W.S. Smith, Jr., Potential Projects: Industrial Bio-Test Laboratories (IBT) 3-4, *at* http://tobaccodocuments.org/rjr/501623574-3577.html (June 3, 1971).

59. Brubaker, *supra* note 49, at 1. Brubaker concluded that the biological research facility was probably closed due to poor management and excessive spending. *Id.* at 146. In addition, RJR had been required to divest itself of two food product subsidiaries for which the Biological Division conducted research.

60. Memorandum from R.J.R. Research and Development Activities Fact Team 15-17 (Dec. 31, 1985), *at* http://tobaccodocuments.org/bliley_rjr/515871651-2176.html (last visited Feb. 23, 2005).

> This memorandum summarizes the information that has been developed to date by the Research and Development Fact Team concerning research and development (R & D) activities at RJR relevant to smoking and health issues. This memorandum provides background on historical R & D activities generally and focuses particularly on events which may have some arguable litigation significance, because they might provide bases for plaintiffs' arguments, for instance,
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> (1) that RJRT discovered or otherwise knew of harmful components in cigarette smoke,
> (2) that RJRT failed to implement or adequately pursue methods to reduce or eliminate harmful constituents,
> (3) that RJRT failed to pursue lines of research which might have yielded adverse results,
> (4) that RJRT took affirmative steps to conceal adverse information, or
> (5) that RJRT failed to publish problematic research findings to alert the scientific community and warn the public.

Id. at 2.

plaintiff's claim. Legal advice not to conduct this kind of research at all only makes sense if it appears that the costs of conducting the research will outweigh the benefit of appearing to behave reasonably in the face of claims that cigarettes are bad for the public health.

This is not a question that a lawyer, qua lawyer, can answer. It depends upon scientific assessments coupled with judgments about the best direction for a firm to take in light of those assessments. The legal advice makes sense only if the firm has decided that it is better off being skeptical about health claims than investigating them. The people at American Tobacco, like those at every other company, had made this decision by the 1970s.[61] The lawyer's job was to provide a legal rationale for why the researchers needed to avoid this area of inquiry.

Even if the question of whether to pursue research into health effects was not for a lawyer to answer, it may have been management's understanding of legal concerns that produced the decision to abjure research into health effects. Negligence law requires an inquiry into the reasonableness of the defendant's conduct, and this turns, in part, on what the defendant knew and should have known. Abstaining from independent research into health effects put the tobacco companies in the position of remaining apparently agnostic on the issue. This takes care of what the companies "knew"; it does not answer the question of what they *should have known*. Here the companies were rescued by regulation. Since they were soon required by federal law to warn the consumer about the danger of cigarette smoking, they could (and did) take the position that they had no need to do health effects research since consumers were being told that cigarette smoking was bad for their health. Indeed, rather than research health effects, the companies instead took the position that consumers knew as much as they did about the capacity of cigarettes to cause harm. The companies' fundamental position was that they would do research about tobacco, smoke, and product (filter vs. nonfilter, the relative value of various filters, the consequences of altering tobacco blends and the like), while leaving it to the medical and scientific community to do the work on health effects.

The litigation-related virtues of this are reflected in a Jones, Day memorandum on litigation tactics prepared in 1985.[62] In a section devoted to dealing with "failure to warn claims," the memorandum advocates a "contextual approach."[63] The memorandum suggests that claims that the tobacco companies had information they withheld from

61. GLANTZ ET AL., *supra* note 32, at 55-56.
62. Tactical Proposal Memorandum, *supra* note 52, at 1.
63. *Id.* at 28-30.

the consumer could be countered by a timeline demonstrating, in essence, that whatever the tobacco companies knew was also public knowledge.[64] As stated in the memorandum:

> A timeline analysis comparing publicly disclosed research with significant internal research will, hopefully, reveal that no cover-up existed and that public and industry knowledge were approximately equal. Emphasis can be placed on internal industry efforts aimed at the analysis of smoke as an example of industry efforts to do its part to ensure that outside research entities had the data they needed to study the product in a detailed fashion, which the companies themselves could not do.[65]

The memorandum notes that this approach requires industry coordination.[66] It also notes that a plaintiff will have a difficult time succeeding on a failure to warn theory given that the plaintiff must prove that he would have behaved differently had the warning been given. The plaintiff's continuing to smoke in the face of widespread public knowledge that cigarettes are dangerous might count heavily against any claim that a particular disclosure of a particular scientific finding from a particular company's research division would have caused him to stop smoking.

Suppose that the cigarette companies operated in a legal environment with a vastly reduced fear of liability to individual consumers for the health effects of cigarettes. Would they have behaved differently in terms of conducting health effects research? After all, as just shown, the approach by U.S. companies of attempting to stay behind the curve of public disclosure promised considerable litigation benefits. Would companies operating in a different legal environment nonetheless opt for ignorance? The companies might still wish to preserve the option to deny causation for purposes of marketing cigarettes, and they might consider that they were in a better position to do so if they did no independent research of their own. This appears to be what occurred in Great Britain where the fear of tort liability was (and is) considerably less than in the United States because the loser in a tort case is required to pay

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64. *See id.*
65. *Id.* at 30-31.
66. The memorandum stated:

> The need for a long lead time to ensure successful preparation on this project lies behind the STIC committee's proposal that each company identify instances in which its documents reflect such state of the art advances and disclosure or non-disclosure so that disclosure by competitors or general public disclosures on such specifics can be identified and pinpointed.

Id. at 32 n.13.

the winner's costs.[67] Even in an environment where tort liability was quite improbable, companies such as British American Tobacco held to the position that causation had not been established.[68]

III. TALKING ABOUT SAFER CIGARETTES[69]

The conflict between denying causation, on the one hand, and informing consumers that some cigarettes were less toxic than others, on the other, was resolved firmly in favor of the former position. The remarks of an RJR lawyer delivered at a market research seminar in June of 1980 present the dilemma, its solution, and the rationale:

> The social acceptability of tobacco is down, because of the consumer's concern for his health: the strong temptation, which you all face, is to tell the consumer he needn't worry, that we have a solution to his problem. But very simply we can't do that (even though we are responding to his perception of a problem and not necessarily admitting that a problem exists) because of two words: *product liability*.[70]

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67. Michael Zander, *Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees?*, 52 DEPAUL L. REV. 259, 264-65 (2002).

68. B.A.T. Indus., Inc., *Smoking and Health: The Public and the Authorities Strategies and Constraints* 1, *at* http://tobaccodocuments.org/bat_cdc/27207.html (Nov. 1978). "However, we must continue to reject claims of causality based on statistical evidence alone." *Id.* Remarkably, the CEO of Imperial Tobacco, a British cigarette manufacturer, testified in *2003* that he did not know whether cigarettes caused cancer. Maureen Moore, *Everyone Else Can See Smoking Link*, EDINBURGH EVENING NEWS (U.K.), Nov. 14, 2003, *available at* http://www.tobacco.org/news/143313.html.

69. For the suggestion that it was now time to talk about safer cigarettes, consult L.C.F. Blackman, *Stance on Smoking and Health: Note for Information and Discussion* 1, *at* http://tobaccodocuments.org/bat_cdc/9675.html (Dec. 18, 1980).

70. Samuel B. Witt, *Market Research Seminar* 2, *at* http://tobaccodocuments.org/bliley_rjr/504100357-0370.html (June 26, 1980) (emphasis added). Witt's directions as to what not to say are set out in handwritten notes on the memorandum and are listed as "No/No's." These include:

> *Don't* create the problem/concern
> *Don't* solve the problem/concern
> " acknowledge existence of a *health problem*
> * " refer to *Youth* or the Young (we sell at a minimum to *Young Adults*)
> " sell a *safer*, better, smarter cigarette
> " talk about the *benefits* of low tar or the alleged *burdens* of high tar
> " refer to consumer habits, needs, invitations [?], dependencies, addictions, or other *medical*, *drug*-related references
> " *assure* or reassure or tell the consumer how *dumb* it is to smoke high tar
> * " talk *moderation* in the sense of safety because that presumes a *threshold* above which smoking is bad
> *Lifestyle* angle may be OK

Id. at 6-7. Product liability's villainy was not limited to preventing the search for safe cigarettes. It has also been identified as underlying the industry's failure to produce a firesafe cigarette:

The presentation continues by informing the marketers that most countries are now moving to strict liability but that the issue of causation still remains. Epidemiology, apparently, is not a science. Despite the many claims of government bodies and medical groups, "it has never been proven (scientific sense) that cigarette smoking causes any disease. . . . A word about statistics: be aware of the reality that numbers establish at best coincidence, not scientific cause, and most thoughtful scientists will agree."[71] On the other hand, while causation remains unproven:

> People have been saying for hundreds of years that smoking may be harmful. In recent years this has been reinforced by the fact that warning labels have been required on all packages of cigarettes and now appear in cigarette ads, in many countries of the world. Under the law as it exists in most countries, if a person is aware of the risks involved in using a product and nevertheless voluntarily chooses to encounter them, he cannot recover in a lawsuit against the manufacturer.[72]

What results from the fortuity that everyone believes what no one has ever demonstrated: that cigarettes cause disease? "Any statements which could be construed as an assurance of safety could override a defense based on the warning now on the package or the general knowledge by the public of the smoking and health controversy."[73] Those involved in marketing need to guard against this possibility. This requires that RJR "balance evermore angels on the head of smaller and

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> The tobacco industry documents are also instructive in understanding why the industry has not produced a fire safe cigarette. One possible consideration was economic—for example, a 1988 RJR analysis suggests that new facilities would be necessary to produce fire safe changes across brands, with costs totaling approximately $200–300 million. Another consideration was liability. A British American Tobacco document from 1983 states:
>
> > "In view, however of their recent decision taken by the Tobacco Institute not to work actively in the development of self-extinguishing cigarettes (*for product liability reasons*) it will be necessary for B&W management to define its wishes before GR&DC is asked to undertake any work."
>
> This document suggests that the industry worked against the drive to create a fire safe cigarette for fear of being held liable for fire deaths and burn injuries. Whether or not these internal industry concerns were responsible for preventing fire safety advancement in subsequent years, the public industry position remained unchanged throughout the 1980s and 1990s.

M. Gunja et al., *The Case for Fire Safe Cigarettes Made through Industry Documents*, 11 TOBACCO CONTROL 345, 349 (2002), *at* http://tc.bmjjournals.com/cgi/content/full/11/4/346 (last visited Feb. 23, 2005) (internal citations omitted).

71. Witt, *supra* note 70, at 3.

72. *Id.*

73. *Id.* at 3-4.

smaller pins."[74] While the company did not want to lose the battle for "low tar leadership," it did not intend to "lose the product liability war, either."[75]

Noting that the industry had not been cautious about health care claims before the litigation began in the 1960s, and pointing to a recent article in the Montreal Gazette reporting that antismoking forces were arguing that advertising blunted health warnings but that "no smoking guns" setting forth this as the "real strategy" had been identified, Witt gave a clear message to his audience:

> And despite our clear policy, are there any smoking guns in your files? Are there any memoranda that suggest that the smoker would be wise to smoke low tar? Are there any questionnaires that ask the smoker whether he believes smoking is harmful? Are there any strategy documents that suggest since smoking is harmful the best we can do is develop a "safer" cigarette? *The answer to these questions is of course a firm no, at least insofar as the past is concerned, and I am here with your help to ensure that that continues in the future.* You really *have* to communicate both internally and with your outside professionals on the assumption that what you write will end up on the front page of the public press.[76]

To paraphrase, we cannot explicitly tell you what you are to do with files containing damaging information (because anything we do or say may end up on the front page). Instead we will congratulate you on achieving the result we desire (purged files) and leave it to you to figure out what we want you to do. Anything suggesting that anyone within the company ever expressed the idea that since smoking was harmful, perhaps smokers ought to be encouraged to smoke "low tar," or that the company ought to consider developing a "safer" cigarette, never existed and will never exist in the future. There should be no record of anything approaching rational thought concerning the question of whether some cigarettes either were or might be made to be less harmful than others. Everyone except those involved in designing, producing, and selling cigarettes might have these thoughts, but not those engaged in these activities.

Did the law of products liability require this result, as the seminar presentation suggests? There is considerable reason to doubt this. Changes in tort law did not generate the need to rally the marketers around the flag of ignorance. The cigarette companies insisted that there was an actual dispute as to whether cigarettes caused disease—identified

74. *Id.* at 8.
75. *Id.*
76. *Id.* at 9 (emphasis added).

as the "smoking and health controversy"—from the earliest days of cigarette litigation.[77] They insisted that there was no scientific proof that cigarettes caused disease, apparently on the view that epidemiology was not science. Insuring the purity of their ignorance, they eschewed research into health effects.[78] Some of those associated with the cigarette industry claimed that they would leave their position if it were ever established that cigarettes caused cancer.[79]

In one of the earliest tobacco cases, *Pritchard v. Liggett & Myers Tobacco Co.*, the court upheld a finding of negligence based on the failure of the manufacturer to warn about the dangers of cigarettes and the failure of the company to conduct tests to determine those dangers.[80] Learned Hand, in *The T.J. Hooper*, had clarified that the custom in an industry, while relevant, was not controlling on the question of whether a practice was reasonable.[81] Negligence principles provided ample cause for concern among the tobacco companies.

Some of the modern tests for defective design may have heightened concern. Tobacco lawyers were quite concerned about the pure risk/benefit test that was embraced by the New Jersey courts during the 1980s. Under this test, the plaintiff satisfied his burden by demonstrating that the risks of a product outweighed its benefits regardless of whether the manufacturer of the product could reasonably have reduced the risks or increased the benefits.[82] This test was viewed as particularly problematic in light of the lack of any demonstrable benefit to the smoker flowing from consumption of cigarettes.[83] On balance, though, it is hard to identify specific changes in tort doctrine that would produce the need to remind marketers to avoid any claim suggesting that cigarettes affect health or that some cigarettes affect it more than others.

Witt's remarks point to developments abroad as one source of concern about the possibility that someone working for RJR may have at

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77. *See* Galbraith Report, *supra* note 18, at 4-15; GLANTZ ET AL., *supra* note 32, at 56.

78. GLANTZ ET AL., *supra* note 32, at 168-69.

79. Specifically, several industry executives have made statements which could be construed as admissions that if smoking is found to cause disease, the benefits do not outweigh the risks. Given the predisposition of jurors to accept the causation hypothesis, these admissions may be damaging, indeed. Mr. Judge, the President of Lorillard and former marketing executive for RJR, testified that if it were proven that cigarette smoking caused cancer, cigarettes should not be marketed and he would quit. Jones, Day, Reavis & Pogue, *supra* note 1, at 22. Gerald Long, president of RJR, stated in an interview: "If I saw or thought that there was any evidence that conclusively proved that tobacco was harmful to people, and I believed it in my heart and soul, then I would get out of the business and I wouldn't be involved in it." *Id.* at 22-23.

80. 295 F.2d 292, 301 (3d Cir. 1961).

81. 60 F.2d 737, 740 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

82. Jones, Day, Reavis & Pogue, *supra* note 1, at 21-23.

83. *Id.* at 190-94.

some time actually written the words "safer cigarette" on a then extant piece of paper.

> [L]ook at what is coming at us from others abroad. In France, the managing director of the monopoly is telling us that his ads recognize that tobacco is "toxic." In Spain, we are relieved to learn that "we can continue to smoke while staying fit." In Brazil to smoke low tar is "an intelligent decision." In Hong Kong, a leading brand is known in Chinese as "the health brand."[84]

The most immediate danger was coming from Britain, where British American Tobacco (BAT) was entertaining the possibility of actually suggesting to smokers that lower tar and particulate cigarettes might be less toxic to smoke. A May 1980 document labeled "Secret," and titled "Appreciation" sets forth the argument that BAT should change its position on causation "to one which acknowledges the probability that smoking is harmful to a small percentage of heavy smokers."[85] The memorandum noted that BAT needed to be worried about its markets throughout the world, and that continuing to deny the widely accepted connection between smoking and disease damaged their credibility and made them vulnerable to antismoking forces globally. The memorandum concluded:

> The ideas suggested above are in some cases a radical departure from our current practice although nearly all have echoes in our overall policy and attitudes. The problem to date has been the severe constraint of the American legal position. This problem has made us seem to lack credibility in the eyes of the ordinary man in the street. Somehow we must regain this credibility. By giving a little we may gain a lot. By giving nothing we stand to lose everything.[86]

Within a few months, Frank Colby, the chief scientist at RJR, was meeting with Lionel Blackmun, the research director of BAT, attempting to persuade him of the folly of abandoning the industry position on

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84. Witt, *supra* note 70, at 8.

85. B.A.T. Co. Ltd., Appreciation 6, *at* http://tobaccodocuments.org/ness/12432.html (May 16, 1980). According to the handwritten marginalia, the recipients of the report were Lockhart, Blackmun and Morini. *Id.* at 1.

86. *Id.* at 10. When asked about the assertion that it was the American legal position that required tobacco companies to continue to insist that cigarettes did not cause disease, Walker Merryman, a spokesman for the Tobacco Institute, testified in 1997 that the cigarette companies did not acknowledge causation because of scientific controversy and not because of legal concerns. Deposition of Walter P. Merryman 388-90, *at* http://tobaccodocuments.org/industry_depositions/TIOK0034909-5155.html (July 16, 1997).

causation.[87] He was not alone in this effort. In the end, it appears that BAT held the line on the "smoking and health controversy."[88]

The approach suggested by BAT resembled that advocated by Dr. Gio Gori of the National Cancer Institute (NCI) who headed the Less Hazardous Cigarette Program at NCI from 1969 through 1977 when it was disbanded.[89] Dr. Gori developed a theory of "critical limits" which suggested that cigarettes with sufficiently low tar and nicotine might be smoked in socially tolerable numbers.[90] When this theory was promulgated in the popular press, it generated great controversy and Gori's job at NCI was eventually eliminated.[91] His theory fared no better as Gori came to recognize that smokers did not smoke low tar and nicotine cigarettes in a "less hazardous manner," and that the machines that measured tar and nicotine underestimated the amount of these products that smokers actually brought into their lungs.[92] In the end, the available evidence indicates that, in the words of the NCI, "[t]he truth is that light cigarettes do *not* reduce the health risks of smoking."[93]

In 1978, just two years before this marketing seminar, Liggett & Myers, a competitor, had abandoned its effort to produce a palladium cigarette.[94] As described by Liggett, the cigarette in question consisted of tobacco supplemented by nitrates and palladium (a substance used in automobile catalytic converters). Experiments demonstrated that condensate from this cigarette significantly reduced the extent to which tumors grew on mice thus responding convincingly to the very evidence that had signaled the emergence of the "health and smoking controversy" in the 1950s. Nonetheless, the cigarette was never marketed. According to the scientist who worked on this new cigarette, Liggett was fearful that it would be the object of successful lawsuits if it produced a cigarette with reduced "biological activity." Doing so would demonstrate that they took seriously the claim that cigarettes caused cancer by spending some

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87. Frank G. Colby, Memorandum Prepared by RJR Scientist, Transmitted to RJR in-House Legal Counsel and Copied to RJR in-House Legal Counsel, RJR Outside Legal Counsel and RJR Scientists for the Purpose of Providing Confidential Information in Order to Assist in the Rendering of Legal Advice Concerning Smoking and Health Issues 1-3, *at* http://tobaccodocuments.org/bliley_rjr/503680902-0904.html (Mar. 31, 1981).

88. GLANTZ ET AL., *supra* note 32, at 168-69, 356-62.

89. Memorandum from Gio B. Gori and the National Cancer Institute's Less Hazardous Cigarette Program 55, *at* http://tobaccodocuments.org/bliley_rjr/515872408-2624.html (Aug. 15, 1986).

90. *See id.* at 2-3.

91. *See id.* at 3.

92. *See id.* at 4.

93. Nat'l Cancer Inst., *supra* note 25.

94. KLUGER, *supra* note 41, at 455-61.

$15,000,000 to try to reduce it. It would also leave them open to claims that they should have produced the cigarette earlier. The second reason the product was not marketed, according to Dr. Mold, was pressure from the other tobacco companies.[95] Despite its insistence to its marketing employees that no one should even mention the idea of a safer cigarette, RJR had attempted to develop its own version of a palladium cigarette, although it placed the palladium in the filter rather than in the tobacco.[96] As of this writing, a palladium cigarette is on the market—Omni, whose Web site announces: "Reduced Carcinogens. Premium Taste."[97]

IV. PREMIER

> "[I]f we would not mkt (market) it (Alpha) as safe, do we need to be killing ourselves to make it so!"[98]

As the marketers were being commended for having files that did not suggest that there could be a safer cigarette, RJR was undertaking to develop one.[99] They did so without abandoning the position that cigarettes are not harmful. As the quote from an anonymous employee in the heading indicates, cognitive dissonance ensued.

Alpha, eventually Premier, was the outgrowth of one of two paths of research that RJR had been following since the 1960s. One approach to the safer cigarette was to join with Gio Gori in the belief that low tar and nicotine cigarettes would be healthier to smoke: RJR developed a cigarette meeting its vision of an acceptable ratio between tar and nicotine only to see the cigarette falter because it did not deliver

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95. Jones, Day, Reavis & Pogue, *supra* note 1, at 235-36. As the memorandum notes:

> As Mold's story now stands, however, Liggett's suppression of the XA—with PM's alleged connivance—is very problematic. Liggett, in short, developed a product which its researchers expected to be safer to smokers, cancelled its plans to market the product because of fear of litigation and pressure exerted by its competitors, and used its patent to deprive others of its invention.

Id. at 236-37.

96. *See id.* at 243-44. The memorandum notes:

> One of the reasons that Reynolds did not pursue the palladium filter was that its commercial use would deplete the world's palladium supply within a year. According to Mold, however, supply would have been no problem, a conclusion which the use of palladium as a catalyst is [sic] automotive exhaust systems seems to confirm. The Liggett story and the Reynolds story stand in contradiction to one another. This contradiction must be resolved.

Id. at 244.

97. Quest Cigarettes, *Nicotine Free Cigs Available Now*, *at* http://www.questcigs.com (last visited Feb. 23, 2005).

98. *Alpha Coding Project*, *supra* note 2, at 46.

99. Memorandum from L.W. Hall Jr., to G.H. Long, Status of Major 1980 Action Programs 5, *at* http://tobaccodocuments.org/rjr/501340581-0591.html (Sept. 17, 1980).

acceptable taste.[100] The other approach was to develop a new and different type of cigarette altogether.[101] Although the initial efforts in this direction (an aerosol generator that pumped nicotine into the smoker's mouth) were halted when marketing studies demonstrated that consumers liked neither the taste nor the idea,[102] a decade later the concept of a cigarette that did not burn tobacco was again apparently being pursued by RJR.[103] Within a few years, this project, now code named "Project G.P./T.G.A.," was heralded by Gerald Long, the CEO of RJR, as "one of the most important projects any of us will be involved in our professional lives" and reminding all of the need for extreme secrecy.[104]

The documents suggest that the drive to produce a safer cigarette during the 1980s came from the top. In a 1981 memorandum, Long laid out long range concerns facing both the tobacco industry and RJR specifically.[105] Long began by identifying the problems facing the industry (and RJR), including the social acceptability and health concerns generated by cigarettes and the inability of the industry to use television advertising and the prospect of a total ban on advertising.

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100. R.J. Reynolds Tobacco Co., *Product Development Report* 16, *at* http://tobaccodocuments.org/bliley_rjr/515873209-3223.html (Nov. 2, 1987).

101. *See id.*

102. L.W. Hall, Jr., *Cigarette "Substitute" Concept Study* 59, *at* http://tobaccodocuments.org/rjr/501001796-1857.html (May 20, 1970).

103. Memorandum from Gregory Novak, to L.W. Hall, Jr., *Monthly Accomplishments* 1, *at* http://tobaccodocuments.org/rjr/501897362-7367.html (Nov. 10, 1980).

104. Gerald Long wrote:

> It is, I believe, safe to say that this is one of the most important projects any of us will be involved in during our professional lives. I say this because the success of this project could easily result in a tremendous long-term competitive advantage to this Company and would clearly have a substantial impact on the tobacco industry as we now know it.
>
> Accomplishments on this project to date have been nothing short of spectacular. They have certainly already exceeded my expectations. These accomplishments are a tribute to your skill and dedication as employees of this Company. However, as you know, much hard work remains to be done before we will have a product ready for commercial introduction.

Memorandum from Gerald H. Long, to Distribution, *Project G.P./T.G.A.* 1 (1984), *at* http://tobaccodocuments.org/rjr/506139380-9381.html (Jan. 1984).

105. R.J. Reynolds Tobacco Co., *Secret*, *at* http://tobaccodocuments.org/rjr/505017620-7623.html (last visited Feb. 23, 2005) [hereinafter *Long Memorandum*]. The document does not carry any internal attribution. However, a memorandum prepared in July of 1986 by Womble, Carlyle, a firm representing Reynolds, refers to the 1981 Gerry Long memo and cites to the Bates number referenced above. Alpha Coding Project, *supra* note 2, at 15.

He proposed:

A. Objective
To market a new product that would essentially overcome all or most of the aforementioned industry and RJR problems, but would concurrently meet all identified present/future consumer wants for a basic cigarette product.

B. Concept
- To *develop* a new product that would:
—*Look* and basically *taste* like a cigarette—providing similar or superior forms of enjoyment and basic imagery.
—Be produced by any combination of natural/man-made (non-tobacco) materials—thereby leaving the potential to be declared clinically safe by appropriate governmental organizations.
—Be manufactured by present/new technology equipment thereby primarily utilizing basic master/packer cigarette resources. *However*, there would be a *need* for totally new technology equipment for production of "basic blend" from identified raw materials.
—Have all present/future cigarette-product properties considered desirable by identified consumer wants:
—Shape, size, color, packaging.
—Tobacco taste, plus additional acceptable flavors—menthol, etc.
—Be *patentable* basis total development/blending/manufacturing processes.[106]

The goal was to create a product that could be advertised as meeting all health concerns that would provide the current smoker with an alternative that would meet his needs while offering the former smoker a safe way to regain the psychological pleasures of smoking.[107] Absolute secrecy was required and the activity was initially to be known by the code name "GP."

RJR sought to both attempt to create a less toxic cigarette and hold to its position that cigarettes are not toxic. It wanted, to borrow Frank

106. *Id.* at 2.
107. As the memo states:

Potential
- Present Smokers

Offer an acceptable alternative to tobacco/cigarette products that would meet their identified wants—that would also concurrently reduce/eliminate concerns.
- Former Smokers

Present the opportunity to enjoy all the various psychological benefits of smoking, but to alleviate all identified concerns.

Id. at 3.

Colby's description of BAT's position in the early 1980s, to "square the circle."[108] The final product of the safe cigarette project was Premier, a cigarette that did not burn tobacco but rather ignited a heating element which generated smoke that passed through tobacco and delivered nicotine to the smoker. The RJR Web site for Eclipse, the current version of Premier, describes the process as similar to a coffeemaker in which the hot water passes through the coffee grounds in order to extract the coffee.[109] This method produced a smoke consisting primarily of water and glycerol laced with nicotine. It eliminated many of the carcinogenic elements produced by the combustion of the tobacco. It also produced an unsatisfactory taste and draw, which contributed to Premier's quick demise in the marketplace.[110] In the days before it became clear that

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108. Frank G. Colby, Memorandum from RJR Scientist, Performing Work on Behalf of the Legal Department, Transmitted to RJR in-House Legal Counsel and Copied to RJR in-House and Outside Legal Counsel, Outside Legal Counsel to Tobacco Companies, RJR Managerial Employee, RJR Employees and RJR Scientists Concerning Scientific Research and Providing Information Upon Which Legal Advice Can Be Rendered 7, *at* http://tobaccodocuments.org/bliley_rjr/505740845-0852.html (June 10, 1982).

109. Eclipse Cigarettes, *The Eclipse Concept: How It Works*, *at* http://www.eclipse.rjrt.com/ECL/how_it_works.jsp (last visited Feb. 23, 2005). The Premier enterprise was conducted under a wide variety of code names during the 1980s. These included, among others, Alpha, Project CC, Project GP, CAL, TGA, and SPA. Deposition of Jeffrey S. Gentry 9-10, *at* http://tobaccodocuments.org/rjr/516960869-1088.html (May 21, 1997); *see also* R.J. Reynolds Tobacco Co., *Proprietary Information Protection Plan*, *at* http://tobaccodocuments.org/rjr/506148446-8448.html; Letter from Wayne W. Juchatz to John D. Gould, *at* http://tobaccodocuments.org/rjr/506148608-8609.html (Oct. 14, 1998).

110. The following is one person's experience with Premier:

> Here is what happened to me immediately after the first puff of a Premier cigarette.
>
> 1. I became very dizzy and unable to focus my eyes.
> 2. Being a Registered Nurse, the aides that were working on my unit called the R.N. Supervisor. When she arrived she took my BP which was 196/126. Pulse was very irregular and I was very white in color.
> 3. Approximately 2 minutes I had a very severe pain in the left temporal region, I was dyspneic, and required oxygen, the ambulance was called and I was transported to Bonne Terre Hospital, where I spent 6 hours in the Intensive Care Unit. I was given Procardia 10 mg. in the ambulance to bring down my B.P. . . .
>
> I would hope this product is soon off the market before a fatality occurs.

Letter from Maxine Link, R.N. to RJ Reynolds, *at* http://tobaccodocuments.org/rjr/506728458-8458.html (Nov. 25, 1988); *see also* Analysis of Media Coverage on Discontinuation of Premier Test Marketing 1-26, *at* http://tobaccodocuments.org/rjr/515283534-3559.html (Mar. 17, 1989). As of February 10, 1989, three months after its introduction, shipments of Premier were ninety-five percent below the initial projections. Management Summary from P.S. Cohen & S.C. Hawkins to G.W. McKenna, Premier Tracking Report V 2, *at* http://tobaccodocuments.org/rjr/514098613-8636.html (Feb. 10, 1989). Premier was withdrawn from the market at the end of February 1989, four months after its introduction. Analysis of Media Coverage on Discontinuation of Premier Test Marketing 1-26, *at* http://tobaccodocuments.org/rjr/515283534-3559.html (Mar. 17, 1989).

Premier was a commercial failure, however, RJR lawyers devoted considerable attention to the marketing of Premier.

In 1988, on the eve of its introduction, J.F. Dorsey of the RJR Law Department explained the challenge to a gathering of sales personnel:

> P[r]emier may be the easiest product to sell because of its important attributes, but it may also be the most difficult assignment you've ever faced in terms of controlling the statements you make. Take time and care in reviewing the Q & A book that will be distributed to you. If you misstate the facts, oversell the cigarette, claim benefits for its use that the company does not claim, you can get the company and yourself in deep trouble.
>
> You will be pushed to say Premier is a safe cigarette. People will want you to assure them it is safer than other cigarettes. You must resist the temptation to give them the answers they want to hear.
>
> The key point to remember is that Premier is a cigarette. Think of it as a cigarette and treat it as a cigarette, sold to smokers for their smoking pleasure. Encourage others to think of and treat it just like any other cigarette. Premier is a cigarette with an important difference. It heats but does not burn tobacco, and the difference has led to the many attributes that we call the cleaner smoke.[111]

Premier could not be sold as a safer cigarette for the same reasons that low tar cigarettes could not be sold as safer cigarettes:

> [T]he traditional anti-smoking activists and the plaintiff's attorneys hope to prove that Premier is a safer cigarette and could have been manufactured and sold many years ago and saved many lives that they claim have been lost to cigarette smoking. Even if they can't prove that fact, they hope to twist our own statements and claims about Premier so that they would appear to be admissions that other cigarettes are hazardous and that significant liability should be imposed on R.J. Reynolds by such admissions.[112]

The more things change, the more they remain the same. The entire point of Premier was to eliminate the carcinogens that come from burning tobacco, but this was what the marketers could not say. To do so would admit that there were carcinogens to be eliminated, and this was unacceptable given the company's commitment to the existence of the "health and smoking controversy." The success of the cigarette depended upon the consumer understanding that when the company said "cleaner" it really meant "safer."[113]

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111. J.F. Dorsey, *Script for Premier Launch Sales Meeting* 7-8, *at* http://tobaccodocuments.org/bliley_rjr/514206755-6763.html (last visited Feb. 23, 2005).

112. *Id.* at 2.

113. *See id.* at 7.

Lawyers were involved intimately in the development and marketing of Premier. Developing a cigarette that reduced "biological activity" meant that the research department would actually have to test for the presence of such activity.[114] RJR had ceased conducting animal tests more than a decade earlier, apparently on the view that it did not believe cigarettes caused biological activity. To now conduct studies to determine if Alpha reduced such activity might be taken as an acknowledgement of its existence. Moreover, RJR would confront the problem of what to do with discovery requests in current and future litigation when the plaintiff makes a routine request for research results.[115] How could it explain its renewed interest?

The legal challenges posed by the search for a safer cigarette went well beyond the possibility that RJR may, by its behavior, support the plaintiff's position that cigarettes cause disease. As noted, the company already knew that juries believed that cigarettes were toxic and discounted anything the industry had to say on the subject. Producing the safer cigarette punctured an even more important aspect of cigarette defense: If RJR could in 1988 produce a safer cigarette, why had it not done so earlier? The companies had always insisted that cigarettes were what they were, and the consumer knew as much about their dangers as did those who made them. If a company could suddenly produce a cigarette that had fewer dangers than all others, the company obviously both knew a great deal more than consumers about the toxicity of tobacco smoke and had the ability to do something about it. RJR would transform itself from a company making an unavoidably dangerous product into one that had been producing a needlessly dangerous product. It became a far more vulnerable target legally.[116] Paradoxically (or conveniently, depending upon one's point of view), RJR was spared the legal embarrassment that might have ensued had Premier been successful. Indeed, the Premier experience might be viewed as supporting the claim of the tobacco companies that a commercially viable cigarette is "inherently unsafe."

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114. *See id.*

115. *Alpha Coding Project*, *supra* note 2, at 142-51. RJR's legal team addressed the question of whether routine discovery demands required them to reveal "Project Alpha" documents in great detail.

116. For a 1994 examination of these issues in connection with research into various filter modifications (Project CC), see Jones, Day, Reavis & Pogue, *Working Issue and Legal Analysis of Project CC*, *at* http://tobaccodocuments.org/bliley_rjr/515873569-3776.html (June 21, 1994).

V. LAW IN ACTION: LESSONS ABOUT LEGAL IMPACT FROM THE SEARCH FOR THE SAFER CIGARETTE

Confronted in the 1950s with information that their product may cause illness and death, the cigarette companies responded by: (1) denying that cigarettes did cause illness, (2) insuring that their own research did not impede their ability to deny causation, (3) developing and bringing to market modifications in cigarettes (e.g., filters and reduced tars) that appeared to reduce their toxicity, (4) refraining from making any explicit health claims with respect to such cigarettes, and (5) occasionally attempting to actually design and market a cigarette that reduced known carcinogens, though refraining from making health claims even for such a cigarette. This behavior made, and apparently continues to make, good sense to the people in charge of the tobacco companies.

How much of this behavior can be attributed to their fear of product liability lawsuits? This question defies a categorical answer. All of these behaviors other than attempting to develop a safe cigarette are consistent with avoiding tort liability for past conduct. They are also consistent with staving off the effort of government agencies to regulate the production and sale of cigarettes. These same behaviors also make marketing sense if, as appears to be the case, it is impossible to make a commercially viable cigarette that actually reduces health risks. The companies would have had significant incentives to deny causation, dampen research, create apparently healthier products, and refrain from making explicit health related claims even if they faced no tort suits on behalf of ill smokers.

What, then, of the occasional efforts by RJR and others to actually develop a cigarette that reduced carcinogenic activity significantly? The marketing advantages of successfully creating such a cigarette were obvious. It posed regulatory concerns—if one actually made health claims, would the FTC seek jurisdiction? From a liability perspective, had the cigarette been successful, the lawyers were ready with a story line of how this product could not have been developed earlier, and the new product really was not needed to protect health but was created only to assuage the fears of the worrywarts among smokers. The existence of the safe cigarette in the marketplace would reinforce the power of the industry's argument that smokers are responsible for the choices they make. If the product was unsuccessful, its very lack of success demonstrated that one could not manufacture a cigarette without burning tobacco.

Many of these same behaviors occurred in Great Britain and Australia where the risk of tort liability was quite low compared to the United States. Yet the tobacco companies operating there may well have been influenced by the concerns of the American tobacco companies. Certainly the American companies viewed the stirrings in Britain towards advising smokers to the relative safety of low tar cigarettes as deeply troubling.[117] The American companies repeatedly preached the importance of holding to the "no causation" line. The constellation of behaviors surrounding the safe cigarette issue followed logically from the premise that there was no evidence that cigarettes caused disease. The major difference between the American and U.K. approaches related to the question of whether to even contemplate encouraging smokers to consider low tar cigarettes on the express ground that these were less toxic than traditional cigarettes.[118] The willingness of BAT to consider, indeed advocate, this approach and the American companies to reject it as out of hand could conceivably reflect their differing perception of the risks of tort liability.

The documents reveal that the American tobacco companies resisted the siren call of urging "moderation" in choices about smoking in part because of a concern that this approach might be viewed as a health claim and thus render the companies subject to regulation by the FTC or the FDA.[119] The documents also suggest that the companies did not want to take this path because they did not want to provide the plaintiff's lawyers with the argument that such a campaign demonstrated that there was something unsafe about traditional cigarettes or that low tar cigarettes represented a safer alternative that the companies should have introduced earlier. Even if we assume that the fear of tort liability is what tipped the balance in favor of calling low tar cigarettes "cleaner" rather than "safer," the claim that this fear was generated by developments in the law of products liability remains unsubstantiated.

American tort law places the financial risk of an unsuccessful law suit on the plaintiff's lawyer rather than the plaintiff. This removes a major obstacle to a lawsuit by an individual against a tobacco company. American law also permits the injured consumer to sue the manufacturer of the product directly. In such a legal regime, it is difficult to conceive

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117. Frank G. Colby, Report Concerning A Scientific Paper or Publication Prepared by RJR Scientist Transmitted to RJR in-House Legal Counsel and Copied to RJR in-House and Outside Legal Counsel, Outside Legal Counsel for Tobacco Companies and RJR Employees for the Purpose of Providing Confidential Information to Assist in the Rendering of Legal Advice, *at* http://tobaccodocuments.org/bliley_rjr/504847041.html (Jan. 7, 1982).

118. *Id.*; Colby, *supra* note 87, at 1-3.

119. Training Presentation, *supra* note 22, at 4.

of a set of rational tort principles that might have persuaded the tobacco companies to move forward aggressively with research into the "health effects" of cigarettes and how to combat them.

Negligence law calls for an inquiry into how a reasonable producer of a product would have acted in light of the information reasonably available to it. This inquiry was not bound by industry practice: rather, since the 1920s at least the jury was free to consider whether the industry standard itself lagged behind what reasonable producers ought to know and do. While the tobacco companies might argue that they could not have known of the detrimental effects of cigarette smoking until Wynder's experiments with mice in the 1950s, juries would not be required to accept this position as reasonable. After all, they might ask, why would Wynder have conducted his experiments if all reasonable people would have agreed that there was nothing to study? Moreover, in 1954 the tobacco companies themselves promised that they were going to take seriously the claim that cigarettes caused disease through supporting research.[120]

By the middle of the 1950s, traditional negligence principles provided the tobacco companies with significant incentives to produce a safer cigarette.[121] So, too, did warranty principles.[122] Tobacco companies

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120. GLANTZ ET AL., *supra* note 32, at 35. The tobacco industry's response was:

1.	We are pledging aid and assistance to the research effort into all phases of tobacco use and health. . . .
2.	For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE.
3.	In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and national repute. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry. . . .

> This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it.

The "Frank Statement" advertisement also clearly expresses the tobacco industry's concern for the health of its customers:

> *"We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."*

Id.

121. A complaint alleging that Liggett and Myers was negligent for failing to do adequate research into the health effects of cigarettes was upheld by the United States Court of Appeals for the Third Circuit in 1961. Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 301 (3d Cir. 1961). The same case upheld plaintiff's claim that Liggett and Myers, through its advertising, had made express warranties that Chesterfield cigarettes were safe to smoke. *Id.* at 296-97.

A plaintiff's lawyer, H. Alva Brumfield, addressing a meeting of Minnesota tort lawyers in 1958 asserted that the tobacco companies were liable under the law as it existed in 1958:

> The tobacco companies are liable on the basis of the following legal principles:

had agreed to study whether their product was harmful, and this undertaking committed them to behave reasonably in conducting such a study. Indeed, the very promise contained in the "Frank Statement" could support a plaintiff's claim that he or she was reasonable in relying on the manufacturer's assurance that cigarettes did not cause disease. In any event, once the companies undertook to conduct research into health effects, they could no longer insist (if they ever could) that they, as reasonable people, had no basis for suspecting that cigarettes caused cancer.

Existing tort and warranty law should have pushed the companies in the 1950s in the direction of investigating, disclosing, and attempting to cure the problem of cigarettes that injure and kill. Two federal circuit courts and a state supreme court had upheld complaints against cigarette companies which did not reference strict products liability. Plaintiffs' lawyers in the 1950s were optimistic that existing law provided a basis for holding the companies liable.

The early cases provide a clue as to why the cigarette companies did not move in the direction that the substantive law indicated. They were successful in both *Pritchard* and *Green* through a combination of noncompromising, aggressive litigation and attacking the plaintiff for having voluntarily consumed their lethal product. Indeed, they defended the suits on the twin grounds that they could not have known the dangers of cigarettes,[123] but that the plaintiff did![124] They could not win as a matter of law but they could and did prevail as a matter of fact. For legal rules

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(1) Negligence in selling, advertising, and distributing their cigarettes without warning of their dangers; *failure to warn*.
(2) Negligence in giving assurances of safety in the selling, advertising and distributing of their cigarettes; *giving assurances of safety*.
(3) *Negligence in manufacturing*, processing, mixing and used the ingredients and tobaccos which were used.
(4) Breach of implied warranties of fitness and merchantability.

H. Alva Brumfield, *Liabilities of the Tobacco Industry*, *in* A SEMINAR BY MINNESOTA ASSOCIATION OF PLAINTIFF'S ATTORNEYS DEVOTED TO MANUFACTURERS AND PRODUCT LIABILITY 168, 168, *at* http://tobaccodocuments.org/rjr/500887145-7357.html (May 2, 1958).

122. *Pritchard*, 295 F.2d at 296-98. In a federal lawsuit commenced in 1958 seeking recovery on behalf of a deceased plaintiff who had been diagnosed with lung cancer in 1954 and died in 1956, the Florida Supreme Court, answering a certified question, held that selling cigarettes that caused cancer breached a manufacturer's implied warranty of merchantability even if the manufacturer did not and could not have known of the dangerous quality of cigarettes. Green v. Am. Tobacco Co., 154 So. 2d 169, 170-71 (Fla. 1963). The jury found that the company was ignorant of the dangers in tobacco in an answer to a special interrogatory. *Id.* at 170; Givelber, *supra* note 15, at 881 n.50. A different jury, presented with different evidence, could have come to a different conclusion.

123. *See Green*, 154 So. 2d at 170.

124. *See Pritchard*, 295 F.2d at 296.

to influence behavior in an undesirable (from the point of view of those subject to the rule) direction, the party has to be aware of the rule and conclude that the costs of not following the rule will outweigh the costs of compliance. The tobacco companies concluded that the risks of compliance—acting reasonably in face of known or knowable risks—were greater than the risks of defiance—maintaining deniability through willful ignorance. This calculus was made all the easier once they concluded that they could not readily produce a safer cigarette.

Two developments during the 1960s strengthened their ability to defend cigarette lawsuits. Paradoxically, rather than being further imperiled by the new law of products liability, the tobacco industry gained support. The American Law Institute accepted as a matter of fact that cigarettes could not be made safer, and specifically exempted cigarettes from the reach of the newly minted section 402A of the *Restatement of the Law of Torts*.[125] Cigarettes were "unavoidably unsafe" and for that reason not defective simply because they were lethal. At the same time, Congress required that cigarette packs contain warnings indicating that smoking cigarettes was bad for a person's health. With the substantive law having been effectively arrested at negligence liability, the companies focused upon defending lawsuits by demonstrating that the informed plaintiff continued to smoke despite the official warnings. Someone who would not stop smoking in the face of government warnings is someone who would not have stopped smoking if the company itself had issued the warning, or so the companies suggested. This has been the tobacco industry's basic, and highly successful, defense to cigarette suits over the last thirty years.

The story of the safer cigarette confirms the logic underlying the "subsequent repair" doctrine: potential defendants *do* consider the evidentiary consequences of a repair before deciding to undertake it. The tobacco companies were exquisitely aware of the legal consequences of attempting to improve the safety of their product. The decisions made concerning whether and how to pursue the safer cigarette were taken with full consciousness that the activity might strengthen the case of consumers already injured by the consumption of cigarettes. Extensive legal work relating to the positioning of Premier and Project CC confirms that RJR was concerned with how to meet the claims that the new cigarettes demonstrated that the existing cigarettes were avoidably unsafe.[126]

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125. *See* Givelber, *supra* note 15, at 873-76; RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

126. *Alpha Coding Project*, *supra* note 2, at 230-42.

The story tells us something else about the subsequent repair doctrine. Its role in a design defect case may be quite limited. RJR's own analysis concluded that the doctrine provided virtually no protection to the cigarette companies' efforts to solve the problem of biological activity. Evidence that a manufacturer modified its product following an accident is admissible to demonstrate the feasibility of an alternative design, and the tobacco company had rested its case for years on the view that cigarettes could not be made any safer than the ordinary consumer believed them to be. The tobacco companies could only avail themselves of the doctrine if they were confident that feasibility would not be an issue in litigation.[127] Yet any design defect case against the companies would present this issue.

If the tobacco companies knew that a subsequent litigant could make no evidentiary use whatsoever of the effort to produce a safer cigarette, would their behavior have changed? The answer would appear to be "no." From the very outset of what the companies referred to as the "health and smoking controversy," the tobacco industry took the position that the absence of proof that cigarettes caused illness meant that there was nothing to repair. As the "Frank Statement to Cigarette Smokers" in 1954 asserted: "We believe the products we are making are not injurious to health."[128] The cigarette companies maintained that position for the next forty years. The introduction of various methods of filtering smoke was justified on marketing terms—providing the consumer with a modification that he preferred on the erroneous belief that it was less toxic.[129] Through the "tar derby" and various modifications in filters, the companies marketed to those seeking less toxicity without explicitly promising (or delivering) it. Simultaneously, they maintained that there was nothing toxic in cigarettes at all.

Their insistence that cigarettes did not cause disease rendered the companies' search for a safer cigarette unnecessary. It also made that search imprudent since it would place executives in an awkward position when it came to dealing with the various regulatory and legislative bodies concerned about cigarettes. Criminal sanctions for perjury and filing false statements provided powerful reasons for executives at the companies to avoid any special knowledge about the link between smoking and disease. As the attorney for American Tobacco put it in the

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127. *See id.* at 17-18.

128. GLANTZ ET AL., *supra* note 32, at 34.

129. Such cigarettes were identified by BAT as "health-image cigarettes" to distinguish them from "health-oriented cigarettes" that might actually produce less disease. *See id.* at 103-04.

1960s, conducting their own research "*could restrict the Company's freedom to accept, before Congress and in the Courts, expert medical and scientific views on a wide range of problems that could not now even be anticipated*."[130]

That liability concerns counseled (even if they did not compel) studied ignorance in the face of accumulating evidence of a public health disaster raises serious concerns about the effectiveness of tort liability and deterrence. Tort law's focus on the reasonableness of a defendant's behavior as the touchstone of legal responsibility may lead to near optimal expenditures on safety in a market with well informed consumers and competitive producers. The well-informed consumer would demand safer products and the producers would compete to produce them. Feasible alternative designs resulting in a safer product would emerge as a result of this competition among the producers. The producers' desire to compete successfully would stoke the fires of technological innovation.

This did not happen among the cigarette companies. They chose ignorance over information, deniability over accountability. While the companies had other reasons to insist that they knew nothing more than the average smoker, tort law did not penalize this position. What it penalized, in the companies' view, was knowledge that was not shared with the consumer. Once Congress legislated warnings on cigarette packages, liability concerns joined with regulatory concerns to encourage the cigarette companies to freeze their knowledge as of 1970.

While it may be difficult to identify post-1950 doctrinal changes in a product manufacturer's liability that clearly changed the tobacco companies response to potential lawsuits, this does not mean that the modern law of products liability has no role in the story. It figured prominently in the legal analysis performed by RJR in terms of existing and anticipated litigation as well as in planning for "safer" cigarettes. More significantly, the post-*Restatement* version of products liability became a preferred explanation for the industry's reluctance to investigate, discuss, or attempt to remedy the "health effects" of cigarettes. An industry beleaguered by ravenous plaintiffs' lawyers armed with new laws that treat reasonableness as irrelevant is more deserving of sympathy than an industry attacked by the NIH or the American Lung Association. An industry under threat from products liability lawyers shares an experience common to the Fortune 500; an industry treated as merchants of death by the Surgeon General does not.

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130. American Tobacco Conference, *supra* note 44, at 1 (emphasis added).

The industry could tell itself and others that the manufacture and sale of cigarettes was a reasonable undertaking by reasonable people: they were under attack because reasonableness was irrelevant.

Are there changes in the substantive law that might have altered this picture? Commentators have suggested that the subsequent repair doctrine looks in the wrong direction.[131] Rather than encouraging manufacturers to repair a problem once it occurs, the law should instead create incentives for those firms who are prepared to investigate the dangers presented by their products prior to their introduction in the market. If privilege should attach at all, in other words, it ought to attach to activities that seek to prevent accidents before they occur rather than simply remedy them after the fact. While attractive as a policy matter, such a shift of doctrine would have likely had little effect on the behavior of the tobacco companies. RJR's own legal analysis demonstrated that the existing doctrine which in theory *supported* RJR's effort at "subsequent repair" provided minimal protection. The market provided all the incentive needed for the tobacco companies to demonstrate that cigarettes were safe. The tragedy is that cigarettes are not safe. The tobacco companies soon understood that they had nothing to gain by attempting to do the impossible and prove that the opposite was true. There may be situations in which evidence doctrine that rewards rather than punishes ongoing safety research will produce positive outcomes, but tobacco is not one of them.

Other observers have taken the matter further, urging that the plaintiff's very need to establish causation ought to be contingent upon whether the defendant responsibly investigated and responded to the possibility of toxic effects prior to introducing the product on the

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131. As Imwinkelreid and McCall put it:

> The preceding analysis raises the policy question of whether there should be any privilege protection for product safety research. We maintain that the answer to the question should be in the affirmative. The current state of the law—conferring privilege protection on forensic experts while denying any protection to experts engaged in bona fide scientific product safety research—is anomalous. Who is the more socially responsible defendant: the manufacturer who investigates its product's safety only after an accident and litigation, or the manufacturer who initiates a scientific inquiry to improve the safety of its product before any accident occurs? The latter manufacturer should be rewarded rather than penalized. However, the current state of the law yields the Catch-22 outcome that the law confers more privilege protection on the manufacturer whose conduct is less socially responsible. Given the fact that the improvement of product safety is an important social goal, the focus of the law of evidentiary privileges should be the positive encouragement of ongoing systematic scientific investigation into product safety.

Imwinkelreid & McCall, *supra* note 11, at 1145.

market.[132] These suggestions rest on the insight that the current structure of accident law encourages producers to maintain ignorance concerning the long-term ill effects of their products. The point is a powerful one, amply demonstrated by the behavior of the tobacco companies. Yet it is not clear that the proposed remedies would have significantly affected tobacco litigation, particularly given the legislative insistence that cigarettes carry a label warning that they are bad for the consumer's health. The toxic tort remedies are primarily directed to solving a problem that tobacco plaintiffs have not traditionally faced: presenting sufficient evidence to survive a motion for summary judgment or a motion to dismiss at the close of the plaintiff's case. Tobacco plaintiffs

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132. Wagner, *supra* note 3, at 833-36. Wagner proposes:

> The proposed reform seeks to accomplish two things. First, it penalizes manufacturers who fail to conduct minimal safety testing on their products. Second, it provides immunity from suit for manufacturers who have conducted a comprehensive battery of tests and found their product to be safe. Common-law courts could adopt this reform incrementally, or legislatures could do so unilaterally. To protect manufacturers from potentially catastrophic liability, ideally, the reform should include a five-to-ten year grace period, during which manufacturers would be put on notice that they must comply with the new rules.
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> The mechanics of the reform are simple. In toxic tort cases, rather than requiring plaintiffs to resolve both trans-scientific and preventable scientific uncertainties, a revised causation rule would place the initial burden for resolving basic, preventable scientific uncertainties on manufacturers. If, prior to marketing its product or prior to the grace period a manufacturer is not able to publicize the "minimal" safety research on its product where some potential for exposure exists (minimal testing), the plaintiff is entitled to a presumption that the insufficiently tested product caused her harm. The plaintiff thus establishes a prima facie case with proof of the following: (1) inadequate minimal testing on a product, (2) normal or foreseeable exposure to the product and (3) serious harm that might be causally linked to exposure to the product. The plaintiff could satisfy the harm element, depending on jurisdiction, by demonstrating the existence of latent physical harms (e.g., cancer, reproductive ailments), emotional harms, medical monitoring costs, or an increased risk of latent physical harm. The defendant then bears the burden of rebutting this presumption of causation. In cases where the manufacturer can convince the jury that its product is benign, either by post-complaint testing or by other means (e.g., chemical family analogy), it will succeed in avoiding liability even without conducting this minimal pre-litigation testing. Otherwise, the defendant manufacturer will have the difficult task of resolving in its favor not only the preventable gaps in scientific knowledge, but also the various trans-scientific uncertainties that currently lie beyond the reach of scientific experimentation.

Id. (internal citations omitted).

Margaret A. Berger takes the matter a step further, urging that

> liability in negligence would be imposed for failure to provide substantial information relating to risk and proof that the failure caused plaintiff's injury would not be required; defendants would be relieved of liability for injuries caused by exposure to their products, provided that they had met the required standard of care for developing and disseminating information relevant to risk.

Berger, *supra* note 17, at 2143.

have been able to present sufficient evidence to get their case to the jury: the challenge has been persuading the jury to find for the plaintiff. Posttrial analyses tended to show that juries were unsympathetic to plaintiffs because the plaintiffs knew that smoking was bad, they could have stopped, and they failed to do so.[133] Unlike the other victims of toxic torts, cigarette plaintiffs knew that the product was toxic and consumed it anyway.[134]

After fifty years of litigation, tobacco companies still manufacture an addictive product that sickens and kills more people than any other consumer product. They do so despite having agreed to a settlement of state litigation involving billions of dollars, and despite the continuation of individual lawsuits against them. They do so even though their conduct has been unreasonable as measured by traditional notions of negligence and warranty law for all of those of fifty years. Tobacco litigation may tell us as much about the limits of the safety achievable through private lawsuits as it does about its promise. To paraphrase a cigarette commercial from the 1970s, the lesson of tobacco litigation seems to be that under certain circumstances "it's better to fight than switch."

Litigation is expensive and time-consuming. Both sides are aware of this, and all maneuvering concerning lawsuits takes these realities into account. Rational defendants can calculate the likelihood that they will lose, the damages that they will be required to pay, and the cost of litigating when they decide whether to settle and for what sum. If they are repeat defendants, they also need to concern themselves about the effect of settling one case on the likely behavior of other potential plaintiffs and their lawyers. They also need to weigh the corrosive effect of perpetual litigation on their ability to run a successful business. Most defendants faced with repeated lawsuits concerning a particular product or practice arrive at a point where changing the practice or product and settling the cases makes sense.

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133. Jones, Day, Reavis & Pogue, *Analysis of Post-Verdict Juror Interview in* Kueper v. R.J. Reynolds Tobacco Company et al. 41, *at* http://tobaccodocuments.org/tplp/536480002-0286.html (July 2, 1993).

134. This does not mean that plaintiffs knew that cigarettes were addictive and that the companies manipulated the delivery of nicotine to keep them that way. These facts certainly go to the moral responsibility of the tobacco companies for the harm they have caused and may be central in the very recent phenomenon of plaintiffs winning tobacco cases. If so, it is not because the plaintiff has suddenly been able to demonstrate causation but because juries have come to believe that blame rests with the tobacco companies, not with the smoker. Richard A. Daynard, *Tobacco Litigation: A Mid-Course Review*, 12 CANCER CAUSES & CONTROL 383, 384 (2001); Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 82-85 (1997).

The tobacco companies, like the asbestos companies, did not perceive settling as an option. They could not stop producing the harmful product, settle the suits arising out of it, and produce other, nontoxic products. They produced a single product, and it was unsafe. Both industries responded to information that their product was dangerous by initially refusing to acknowledge what epidemiology showed, and both initially resisted claims by injured plaintiffs. However, the tobacco industry had an advantage that the asbestos industry lacked. It could and did blame the consumer for choosing to smoke. Initially, the industry could rely on the common understanding that long preceded the first Surgeon General's Report: that cigarettes were "coffin nails." Shortly after litigation began, however, they could rely on the far more potent warning that Congress required them to place on the package and in their advertisements.

The response to potential liability was to assume a defensive posture that made perfect sense in light of negligence and warranty theories: warn the consumer, eschew health claims, and litigate fully every suit brought against them. The tobacco companies acceded to the demands of tort and warranty doctrine when compliance was less expensive than defiance: they refrained from making health claims. For the rest, they relied on the grinding effect of transaction costs, knowing that their ability and willingness to litigate every issue as thoroughly as possible would overwhelm plaintiffs. The strategy has been successful for most of the past fifty years. The emerging law of products liability played a surprisingly small role in this story.

It is perilous to arrive at broad generalizations from the impact of tort law on the tobacco companies' search for a safer cigarette. The tobacco industry is sui generis. The apparent lack of a safer alternative product that they *could* produce combined with the addictive nature of the product that they *did* produce placed the tobacco companies in a unique position: they could continue to sell their product even as they told people that the product was bad for them. They could and did then defend lawsuits on the grounds that the plaintiff should not have used the product in the first instance. The prospect of tort liability did not destroy the industry. But it may have joined with the possibility of FTC and FDA regulation in contributing to a significant reduction in cigarette smoking. It was legal risk, not considerations of citizenship, morality or marketing, that stopped the cigarette companies from providing potential and current smokers with what so many of them wanted: reassurance that there was a way to smoke that would not damage their health.

Did the industry's reluctance to make health claims advance or retard the public health? With respect to low tar and nicotine cigarettes, the answer seems clear. People smoked these cigarettes in the belief that they would prove less toxic than traditional cigarettes even though the industry never made an explicit claim that this was so. Many more of these cigarettes would likely have been consumed had the industry provided any express assurance that they were in fact less toxic. As noted, the available evidence indicates that this would have been a false claim: low tar and nicotine cigarettes, as consumed, are as toxic as traditional cigarettes.

What about the "true" safer cigarettes that actually do reduce the amount of toxins in cigarette smoke? If these cigarettes actually have fewer negative health effects, it seems clear that the industry's reluctance to say this has put a damper on the demand that would otherwise exist. However, even assuming that fewer toxins would actually reduce the health damage done by smoking (a proposition that has yet to be established), this benefit would be limited to those who embraced the new cigarette and (a) would have continued smoking in any event and (b) did not increase their consumption of cigarettes or change their method of smoking them. If the existence of a "safe" cigarette either led existing smokers to smoke more than they otherwise would have, or induced those who otherwise would have quit to continue smoking, or tempted those who had quit to return,[135] or induced those who would not have smoked to take it up, then developing and marketing a safe cigarette as such might actually prove to be a public health disaster. We do not know the answer to these questions. Until and unless we do, there is no way to assess definitively the public health consequences of the role that tort law may have played in retarding the emergence of a safe cigarette, advertised and marketed as such. My guess is that tort law's role in restraining the development and marketing of an allegedly safe cigarette advanced rather than retarded the public health.

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135. This is what Gerry Long had in mind when he proposed the new concept that eventuated in Premier. *See* Long Memorandum, *supra* note 105, at 2-4.